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No.

IN THE
Supreme Court of the United States
October Term, 1981

PASS WORD, INC. and RODNEY J. BACON
d/b/a COEUR D'ALENE ANSWERING SERVICE,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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July 1, 1982

QUESTIONS PRESENTED

Petitioners, licensees of Respondent Federal Communications Commission,[1] were ordered to show cause why their licenses should not be revoked for certain misrepresentations. They waived their right to an evidentiary hearing and submitted, instead, a written statement in explanation and mitigation. The Commission staff member who had acted as investigator-prosecutor under the order to show cause prepared a recommended decision for revocation and presented it ex parte to the Commissioners, who adopted it.

This intermingling of prosecutive and adjudicative functions was challenged by the licensees as violative of the Administrative Procedure Act. The Commission was advised ex parte by the investigator-prosecutor that the challenge was without merit and, pursuant to her recommendation, the petition for reconsideration was denied. The court of appeals, in affirming the revocation of the licenses, avoided the point that the intermingling of the prosecutive and adjudicative functions violated the Administrative Procedure Act by holding that the licensees had waived their right to object.

The following questions are presented:

1. Whether the decision of the court below, in holding that the licensees' argument had been waived even though it had been specifically presented in compliance with Section 405 of the Communications Act, 47 U.S.C. § 405, and had been fully considered by the agency, conflicts

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[1]The Estate of Jennings Bacon, which owns 51.5% of the stock of one of the Petitioners, was an intervenor in the court below and therefore is deemed to be a respondent in this proceeding.

with the holdings of the courts of appeals for two other federal circuits that no waiver occurs in these circumstances?

2. Whether the court of appeals' finding of a "knowing" waiver of Petitioners' rights under the Administrative Procedure Act conflicts with the standards for waiver established by this Court in *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967)?

3. Whether waiver of an evidentiary hearing permits a federal administrative agency to dispense with the separation of functions requirements of the Administrative Procedure Act?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Pass Word, Inc. ("Pass Word") and Rodney J. Bacon d/b/a Coeur d'Alene Answering Service ("CDA") petition that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on April 2, 1982.

OPINIONS BELOW

The opinion of the court of appeals (App. A)[1] is reported at 673 F.2d 1363 (D.C. Cir. 1982). The Order of

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[1]App. refers to the Appendix to this Petition.

the Commission (App. B) is reported at 76 F.C.C.2d 465 (1980), and its opinion denying reconsideration (App. C) is reported at 86 F.C.C.2d 437 (1981).

JURISDICTION

The judgment of the court of appeals was entered on April 2, 1982. The jurisdiction of this Court is invoked under 47 U.S.C. § 402(j) and 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 5(c) of the Administrative Procedure Act, 5 U.S.C. § 554(d), states in pertinent part:

> "An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings. This subsection does not apply –
>
> (A) in determining applications for initial licenses;
>
> (B) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or
>
> (C) to the agency or a member or members of the body comprising the agency."

Section 405 of the Communications Act, 47 U.S.C. § 405, states in pertinent part:

> "The filing of a petition for rehearing shall not be a condition precedent to judicial review of any

such order, decision, report, or action, except where the party seeking such review (1) was not a party to the proceeding resulting in such order, decision, report, or action, or (2) relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass."

STATEMENT OF THE CASE

Pass Word and CDA are licensees of the Federal Communications Commission ("FCC" or "Commission") in the Domestic Public Land Mobile Radio Service in Spokane, Washington and Coeur d'Alene, Idaho, respectively. They provide paging, mobile telephone, and answering services in Spokane and Coeur d'Alene and the surrounding rural areas. Bacon owns CDA and is president and owner of 49.5% of the stock of Pass Word.[3]

During 1972, Pass Word and CDA applied to the Commission for construction permits for additional facilities. The two permits were issued in 1973 and 1974, requiring construction to be completed within eight months of the respective grant dates. In June 1974, Bacon notified the Commission that construction had been completed and that both Pass Word's and CDA's facilities were ready for operation, even though construction was not actually completed until many months later.

In 1976, the Commission issued an order requiring Pass Word and CDA to show cause why their licenses should not be revoked because of these and related misrepresentations, and designating issues for hearing. *Pass Word, Inc.*,

[3]Pass Word, Inc., apart from CDA, has no parent company, subsidiary, or affiliate for purposes of Rule 28.1 of the Rules of this Court.

61 F.C.C. 2d 410 (1976) (J.A. 73).[4] On October 28, 1976, three members of the Commission's Common Carrier Bureau's trial staff entered appearances in the revocation proceeding. J.A. 108. Their duty was to function both as investigators and prosecutors supporting revocation. They began by propounding detailed interrogatories and document production requests to Pass Word and CDA.

The licensees, with the approval of the Administrative Law Judge designated by the Commission to preside at the evidentiary hearing, waived their right to such a hearing and chose instead to submit a statement in explanation of the delays in construction and setting forth factors mitigating the misrepresentations.[5] The Bureau's trial staff demanded that, as a condition of waiver, Pass Word and CDA complete their responses to the staff's discovery requests. Pass Word and CDA complied with this demand and filed their mitigation statement on March 12, 1977. J.A. 116.

On December 19, 1979, the Commission held an open meeting concerning Pass Word and CDA. At the meeting, the principal member of the trial staff investigating and prosecuting the case presented a recommended decision which she had prepared revoking all of Pass Word's and CDA's licenses. Petitioners were not afforded any opportunity to reply. The Commission, after a brief colloquy, adopted the proposed decision.[6]

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[4]J.A. refers to the Joint Appendix in the court of appeals.

[5]Section 1.92(b) of the Commission's rules, 47 C.F.R. § 1.92(b), provides that following a waiver of hearing in a revocation proceeding, the respondent licensee may submit "a written statement signed by the respondent denying or seeking to mitigate or justify the circumstances or conduct complained of . . .."

[6]Official Tape of Commisison Meeting, Dec. 19, 1979. Instead of preparing transcripts of its meetings, the Commission tapes them and

The opinion (App. B) concluded that Pass Word and CDA had engaged in a series of deliberate misrepresentations concerning the date when construction was completed, in seeking to explain the delays in construction, and in later applications for additional facilities. The Commission concluded that the licensees' otherwise exemplary service record, the steps undertaken by them to prevent recurrence of the misrepresentations, their showing that there were inadequate available alternative services, and other factors did not constitute sufficient mitigation to overcome the sanctions which it decided to impose for the misrepresentations, namely, revocation of all of Pass Word's and CDA's licenses.

Pass Word and CDA filed a timely petition for reconsideration (J.A. 272) in which they argued, among other things, that the participation of the investigator-prosecutor in the Commission's deliberations and her writing of the agency's opinion violated the prohibition in Section 5(c) of the Administrative Procedure Act (APA) on the intermingling of investigators or prosecutors in the decision-making process.

The Commission denied reconsideration after being advised ex parte by the same investigator-prosecutor that the challenge was without merit. (App. C)[7] The Commisson held that Pass Word and CDA's waiver of an evidentiary hearing before the Administrative Law Judge was an implicit waiver of the APA separation of functions requirements.

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makes a duplicate tape available upon request. A copy of the tape of this meeting and of the meeting where the reconsideration decision was adopted, along with transcripts prepared from the tapes, were lodged with the court of appeals with its permission.

[7]Official Tape of Commission meeting, April 23, 1982. See note 6, *supra*.

On appeal to the United States Court of Appeals for the District of Columbia Circuit pursuant to Section 402(b) of the Communications Act, 47 U.S.C. § 402(b), Pass Word and CDA argued that neither the APA nor its legislative history permitted an agency to dispense with functional separations requirements in an adjudicatory case merely because no evidentiary hearing occurred. In the brief for the Commission, the agency's counsel for the first time suggested that Pass Word and CDA had waived their right to object to the staff's participation by not raising the matter before the Commission reached its decision. Pass Word and CDA pointed out in reply that the Commission had not found a knowing waiver, and hardly could have done so given the fact that more than ten months after Pass Word and CDA had waived their evidentiary hearing, the Commission held in an unrelated case that the effect of such a waiver did not appear to have been understood. Petitioners stressed the fact that they had raised the issue at the first opportunity after they became aware of the investigator-prosecutor's activities.

The court of appeals did not rule on Pass Word and CDA's argument, but instead affirmed the agency's decision, holding that Petitioners had knowingly waived their right to object. It stated:

> "Appellants first raised this objection in their April 1980 Petition for Partial Reconsideration, when alteration of the mode of proceeding in this case was impossible. However, appellants previously knew or should have known, particularly after the Commission's decision in *Mullin, Connor & Rhyne,* 41 Rad.Reg. (P&F) 1681 (1977), that it is the FCC's general practice not to require separation of functions after a waiver of hearing.

See also Amendments of Part I of the Commission's Rules Concerning Revocation and Cease and Desist Proceedings, 25 Fed. Reg. 12602 (1960). Failure to interpose a timely challenge to the Commission's routine and published mode of proceeding precludes appellants from prevailing on this point." App. 3a.

REASONS FOR GRANTING THE WRIT

Although Pass Word and CDA, at the first opportunity legally available to them, had fully presented to the Commission their arguments that the ex parte participation in the decisionmaking process of the FCC's investigator-prosecutor violated the APA, the court of appeals found that the licensees had knowingly waived their right to object to this procedure and were precluded from pressing the argument on appeal. Three grounds for the exercise of this Court's jurisdiction are raised.

The refusal of the court of appeals to consider an argument timely and properly raised in a petition for reconsideration to the Commission and fully considered on the merits by the agency – at a time when, contrary to the court's opinion, "alteration of the mode of proceeding" was possible – squarely conflicts with a holding on the same point by the United States Court of Appeals for the Seventh Circuit in *Wilson & Co. v. United States.*[8] In that case, the court held that the petitioners had not waived their right to argue a breach of the APA functional intermingling prohibition, even though the matter had not been presented to the FCC at all and was raised for the first

[8] 335 F.2d 788 (7th Cir. 1964), *cert. denied,* 380 U.S. 951 (1965), *remanded,* 382 U.S. 454 (1966).

time in the court of appeals. The decision below is also inconsistent with the holding of the United States Court of Appeals for the Ninth Circuit in *Getty Oil Co. v. Andrus,*[9] which held that no waiver would occur if a party asserted a contention before the end of the administrative process. The holding in *Getty Oil* is in accord with Section 405 of the Communications Act, 47 U.S.C. § 405, which requires only that a party present an issue of this kind to the Commission in a petition for rehearing, as Pass Word and CDA did, as a precondition to arguing it on appeal. The holding of the court below that the right to have adjudication separated from prosecution had been knowingly waived also conflicts with the standards for waiver of such rights established by this Court in *Curtis Publishing Co. v. Butts,* 388 U.S. 130 (1967).

The decision below presents, therefore, an important question concerning appellate review of denials of APA procedures on which the circuits have expressed conflicting views. It also presents the question of the standards which may be applied to determine when a "knowing" waiver of procedural rights has occurred. Moreover, the court's affirmance of the Commission's decision to the effect that the waiver of a hearing deprives a licensee of the guarantee of an administrative adjudication free from the ex parte participation of agency prosecutors presents a dangerous exception to provisions the Congress intended to be all-encompassing. Review by this Court is thus needed to preserve what this Court has recognized as a right "fundamental" to the APA.[10]

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[9]607 F.2d 253 (9th Cir. 1979).

[10]*See* Wong Yang Sung v. McGrath, 339 U.S. 33, 41 (1950).

I. The Decision Below, in Conflict With the Holdings of Two Courts of Appeals and the Communications Act, Foreclosed Petitioners From Reliance Upon a Fundamental Procedural Point Fully Presented to the Commission

At the Commission's open meeting on December 19, 1979, during which the order revoking Pass Word's and CDA's licenses was adopted, Petitioners became aware for the first time that the principal staff member assigned to investigate and prosecute them had both written a decision recommending total forfeiture of their licenses and was presenting it ex parte to the Commission. Petitioners vigorously protested this procedure in their petition for reconsideration, arguing that it violated Section 5(c) of the APA, 5 U.S.C. § 554(d). In denying their petition, the Commission did not question the timeliness of Pass Word and CDA's objections, but instead concluded that, having waived an evidentiary hearing before the Administrative Law Judge, they had no right to the procedural protections of the APA. The court of appeals nevertheless held that the right to object to the APA violation had been waived by the licensees' failure to protest earlier.[11] The court of appeals' holding in this case is in conflict with the decisions of two other courts of appeals, decisions which are in accord with the rehearing provisions of the Communications Act.

In *Wilson & Co. v. United States*, 335 F.2d 788 (7th Cir. 1964), *cert. denied*, 380 U.S. 951 (1965), *remanded*, 382 U.S. 454 (1966), counsel to the FCC's Common Carrier

[11] In relying on a theory of waiver neither adopted nor even mentioned by the Commission, the court of appeals violated the established principle of judicial review that a reviewing court cannot substitute its own grounds for those adopted by the agency. SEC v. Chenery Corp., 318 U.S. 80, 88 (1943).

Bureau had participated in the Commission's decision. No objection was made to this procedure either prior to the Commission's decision or on reconsideration. In the court of appeals, petitioners argued for the first time that the staff's participation in the decision violated the APA. The Commission responded that the petitioners had waived the right to argue the error on appeal by failing to raise it during the administrative proceedings.

The Seventh Circuit disagreed, stating:

> "We are not persuaded by the argument of the Commission and AT&T that petitioners were on notice during the hearing that such participation in the decisionmaking process might occur and hence should have filed their objections with the Commission."[12]

The court concluded that no waiver had occurred, even though it recognized that the Commission's rules could be read as apprising petitioners of the role the staff would play. 335 F.2d at 797 & n.4.[13] Thus, even where the Commission's failure to abide by the APA had never been argued to the agency, the Seventh Circuit nevertheless found that no waiver had occurred — a conclusion directly opposite from the one reached by the court of appeals below.[14]

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[12]335 F.2d at 794.

[13]It is noteworthy that the provision which was not read as notification to petitioners by the Seventh Circuit was actually a part of the Commission's Rules, while the court below relied in part on an introductory statement never incorporated in the agency's published Rules. (App. 3a)

[14]After finding that there was no bar to petitioners making their APA argument, the *Wilson* court went on to consider the merits. Since, unlike this case, the Commission proceeding in *Wilson* was rulemaking and not adjudication, the court ultimately concluded that the staff's participation in those circumstances did not contravene the APA.

The court of appeals' decision is also in conflict with *Getty Oil Co. v. Andrus,* 607 F.2d 253 (9th Cir. 1979), which involved the awarding of geothermal steam leases by the Secretary of Interior. After one party's application has been approved, Getty brought up for the first time the contention that the applicant had not properly disclosed the parties in interest as required by Department of Interior rules. On review, the district court held that the doctrines of exhaustion of administrative remedies and waiver barred from consideration Getty's contention since it had not been raised until after the initial grant decision. The court of appeals held, however, that:

> "Exhaustion of remedies and waiver . . . are doctrines to be invoked only when the administrative process has been completed. They are not designed to extinguish claims which, although not comprehensively or artfully presented in the early stages of the administrative process, *are presented fully before the process ends.*"[15]

The Ninth Circuit concluded that because Getty had raised its arguments before the administrative proceedings were finally completed, it was not barred from making those contentions on appeal, a holding strikingly at odds with that reached by the court of appeals in this case.

The principle applied in *Getty Oil* is supported by Section 405 of the Communications Act, 47 U.S.C. § 405, concerning petitions for rehearing of Commission decisions. In pertinent part, Section 405 states:

> "The filing of a petition for rehearing shall not be a condition precedent to judicial review of any such order, decision, report, or action, except

[15] 607 F.2d at 256 (emphasis added).

> where the party seeking such review . . . relies on questions of fact or law upon which the Commission . . . has been afforded no opportunity to pass."

The purpose of this provision is "to afford the Commission the initial opportunity to correct errors in its decision or the proceeding leading to decision." *Rogers Radio Communications Services, Inc. v. FCC*, 593 F.2d 1225, 1229 (D.C. Cir. 1978). With certain exceptions, Section 405 bars judicial consideration of matters not presented to the agency. By the same token, however, once a party has sought reconsideration to give the Commission an opportunity to correct its decision, judicial consideration of the party's arguments should be insured. The statutory grant of rehearing procedures to permit new arguments to be raised would become a nullity if, after a party raises an issue on reconsideration, review is still foreclosed by the court's ruling that the issue should have been argued earlier.

Getty Oil's holding that once an issue is fully considered by the agency, it cannot be deemed waived, is in line with Section 405. In *Great Falls Community TV Cable Co., Inc. v. FCC*, 416 F.2d 238 (9th Cir. 1969), the United States Court of Appeals for the Ninth Circuit permitted the petitioner to argue on appeal any issues on which the Commission had had opportunity to pass. *Id.* at 239-40. But on an issue not raised before the agency and on which reconsideration was not sought, review was deemed barred. *Id.* at 242-43.

The court below was also wrong in asserting that Pass Word and CDA objected to the FCC's procedures only "when alteration of the mode of proceeding in this case was impossible." (App. 3a) If the Commission had con-

cluded that its procedures were flawed, it could have referred the record to its Office of Opinions and Review for appraisal of the case and the preparation of a new opinion. Although that office was established to enable the Commission to rely on an independent adjudicative staff separate from investigating and prosecuting personnel,[16] the Commission chose not to seek its aid.

Under the standards of *Wilson* and *Getty Oil* and the policy of Section 405, Pass Word and CDA were fully entitled to press the APA argument made to the FCC before the court of appeals. The decision below thus squarely conflicts with the holdings of two other courts of appeals that such arguments may not be deemed waived on appeal.[17]

II. The Holding Below of a "Knowing" Waiver is Contrary to the Standard Set by This Court and the Policy Underlying the Waiver Doctrine

The court of appeals held that Pass Word and CDA "knew or should have known" before the Commission acted that in making its decision it would not conform to the APA separation of functions requirements, and that the failure to protest the violation before it occurred precluded the licensees from raising the argument later.

[16] *See* 47 C.F.R. § 0.171. The Office of Opinions and Review was recently merged with the Office of General Counsel and now is known as the Adjudication Division of that office. Reorganization of the Office of Opinions and Review and the Office of General Counsel, 46 Fed. Reg. 57,049 (1981).

[17] In similar circumstances where the circuits were in conflict on whether the Internal Revenue Service had waived arguments not raised before the Board of Tax Appeals, certiorari was granted to resolve the conflict in Hormel v. Helvering, 312 U.S. 552, 555 (1941). See p. 19, *infra*.

The court's assumption that a knowing waiver occurred, based in large measure on a decision in another case announced almost a year after Pass Word and CDA elected to proceed without an evidentiary hearing is, as we shall demonstrate below, in derogation of this Court's decision in *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), and the policies which support the waiver doctrine.

Pass Word and CDA sought leave to proceed without an evidentiary hearing on January 18, 1977. Leave was granted by the Administrative Law Judge on February 11, 1977, and the licensees' mitigation statement was filed on March 12, 1977. The decision relied on by the court of appeals to show that Pass Word and CDA knew that the FCC would permit its prosecutor to participate in its decision, was announced in December 1977 and was never officially published. *Mullin, Connor and Rhyne*, 41 Radio Reg. 2d (P&F) 1681 (1977).[18]

The finding of the court that Pass Word and CDA "knew" they were giving up their APA rights thus rests on a letter written by the Commission to another litigant almost one year after Pass Word and CDA elected to pro-

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[18]In *Mullin*, another revocation proceeding, the Commission, in a letter to counsel written more than ten months after Pass Word and CDA waived their hearing, had stated that its policy was that waiver of an evidentiary hearing constituted a waiver of other procedural rights before the Commission and that such cases would be presented to the Commission by its investigative staff as nonhearing items. Such presentations would not be deemed ex parte contacts. The Commission went on in that case to state that: "[s]ince the procedures used when waiving the right to a hearing do not appear to have been understood fully by [the licensee, it] . . . is hereby given the opportunity to withdraw its waiver of hearing. . . ." *Id.* at 1682. The Commission's letter only appeared in Pike & Fisher Radio Regulation on January 11, 1978.

ceed without an evidentiary hearing. In addition to that single, unofficially reported letter, the court cited the 1960 introduction to the Commission's amended revocation rules (App. 3a), which contained a single comment that separation of functions requirements would not be applied when a hearing was waived. That comment, however, was neither embodied in the actual rules nor incorporated into the agency's reports.

In *Wong Yang Sung v. McGrath*, 339 U.S. 33, 41 (1950), the Court characterized the separation of agency functions as having been one of the "fundamental" purposes of the APA.[19] It stated:

> "'A genuinely impartial hearing, conducted with critical detachment, is psychologically improbable if not impossible, when the presiding officer has at once the responsibility of appraising the strength of the case and seeking to make it as strong as possible.'"[20]

When fundamental rights are at issue, this Court has ruled that "[a] waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). There was nothing in the record before the court of appeals to indicate that Pass Word and CDA either had any intent to give up such an important right under the APA to separation of agency functions or even knew that the waiver of a

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[19]The broad application of section 5(c) of the APA and the intent of Congress to separate investigation and prosecution from agency decisionmaking was recognized in Withrow v. Larkin, 421 U.S. 35, 52 (1975).

[20]339 U.S. at 44, *quoting* The Secretary of Labor's Committee on Admnistrative Procedure, The Immigration and Naturalization Service 82 (Mimeo. 1940); *see Developments in the Law - Conflicts of Interest in the Legal Profession*, 94 HARV. L. REV. 1244, 1419 (1981).

hearing might create such a possibility until the Commission's investigator-prosecutor presented the proposed decision ex parte to the Commission at the meeting where their licenses were revoked.[21]

In *Curtis Publishing Co. v. Butts,* 388 U.S. 130 (1967), Curtis, the defendant in a libel action, had not interposed any constitutional defenses prior to its trial. After the trial, *New York Times v. Sullivan,* 376 U.S. 254 (1964), was decided and Curtis made constitutional arguments relying on it in an unsuccessful motion for a new trial. The court of appeals refused to address Curtis' constitutional argument, holding that Curtis had waived any such claims by not raising them prior to trial. Because of the ferment in libel law generally and the fact that some of Curtis' attorneys had also been counsel in the *New York Times* litigation, the court concluded that Curtis should have been aware of the potential constitutional issues. *Curtis Publishing Co. v. Butts,* 351 F.2d 702 (5th Cir. 1965).

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[21]This distinguishes the case at bar from International Paper Co. v. FPC, 438 F.2d 1349 (2d Cir.), *cert. denied,* 404 U.S. 827 (1971), relied on by the court of appeals (App. 3a), where the petitioner's counsel had served for more than 30 years in the agency's solicitor's office and indisputably knew of its practices. Commission counsel at the court of appeals also cited in support of their waiver argument the Common Carrier Bureau's response to the opposition to Pass Word and CDA's waiver request filed by a competing applicant. Reply of the Chief, Common Carrier Bureau, to Qualified Opposition of Courtesy Communications, Inc., filed Feb. 4, 1977, J.A. 110. Responding to the competitor's request that it and the Bureau be permitted to comment on Pass Word and CDA's statement, the Bureau stated that it would continue to make inquiries and would "advise the Commission regarding the disposition of the revocation issues." That statement, addressed to another party, that the staff would "advise" the agency did not suggest that such advice would be offered ex parte or that the staff would assume a decisionmaking function.

This Court reversed the finding of waiver.[22] It held that Curtis' attorneys had not been unreasonable, before the *New York Times* decision was announced, in focusing solely on state law defenses. 388 U.S. at 144. As to the participation of some of Curtis' attorneys in the *New York Times* case, Justice Harlan stated: "we think it inadvisable to determine whether a 'right or privilege' is 'known' by relying on information outside the record concerning the special legal knowledge of particular attorneys." *Id.*

Rejection of the waiver argument was also deemed by the Court to be in the interests of justice. Curtis had raised its argument in time for the courts below to consider it. Moreover,

> "[t]he resolution of the merits of Curtis' contentions by the District Court makes it evident that Butts was not prejudiced by the time at which Curtis raised its argument, for it cannot be asserted that an earlier interposition would have resulted in any different proceedings below." *Id.* at 145 (footnote omitted).

The court of appeals in the present case held that Pass Word and CDA "knew or should have known" that the FCC would not follow the procedures mandated by the APA, relying on a letter to counsel in an unrelated case written months after the licensees elected not to have an evidentiary hearing. This Court in *Curtis* rejected the approach of the court below, finding that knowledge sufficient to justify waiver could not be presumed merely from the state of the law or the supposed knowledge of counsel, particularly where the matter deemed abandoned turns on

[22] Justice Harlan's plurality opinion was joined on the waiver issue by Justices Brennan and White, making that portion of his opinion a majority holding. 388 U.S. at 172 n.1 (Opinion of Brennan, J.).

a decision announced after the presumed waiver. As other courts of appeals have emphasized, waivers must be of a *known* right. *See Sambo's Restaurants, Inc. v. City of Ann Arbor, 663 F.2d 686, 693 (6th Cir. 1981); Holzsager v. Valley Hospital,* 646 F.2d 792, 796 (2d Cir. 1981).[23]

When Pass Word and CDA learned of the FCC's violation of the APA, they promptly brought it to the Commission's attention.[24] The court of appeals' finding of a knowing waiver in these circumstances cannot be reconciled with *Curtis Publishing.*

Further, in light of Justice Harlan's reasoning in *Curtis Publishing,* the court of appeals' holding is manifestly unjust. Pass Word and CDA gave the Commission a full opportunity to correct its error.[25] The agency's rejection of the licensees' arguments amply demonstrates that the

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[23]The court in *Holzsager* stated (646 F.2d at 796):

> "[A] party cannot be deemed to have waived objections or defenses which were not known to be available at the time they first could have been made, especially when it does raise the objections as soon as their cognizability is made apparent."

[24]That Pass Word and CDA at the first opportunity brought their APA argument to the Commission's attention contrasts with the situation in United States v. L. A. Tucker Truck Lines, Inc., 344 U.S. 33 (1952), where the appellee "did not bestir itself to learn the facts until long after the administrative proceeding was closed and months after the case was at issue in the District Court. . . ." *Id.* at 35. Moreover, the waiver holding in *Tucker* also rested on the absence of any potential prejudice, the Court noting that the improperly appointed examiner "did not act and was not expected to act as prosecutor and judge." *Id.*

[25]As noted above, the court was incorrect in finding that, once the revocation decision had been reached, the procedural error could not be rectified. The Commission could have vacated its decision and ordered a new opinion prepared by its Office of Opinions and Review, an entity specifically established to independently assist the agency in adjudications. See pp. 12-13, *supra.*

Commission was not prejudiced by any delay since it obviously would have denied Pass Word and CDA's claim even if it had been made earlier. That an earlier objection would have served no purpose is evidenced by the fact that even after Pass Word and CDA had argued that the preparation of the decision by the prosecutor violated the APA, the same individual wrote and presented the agency's reconsideration decision denying Pass Word and CDA's argument that her previous participation had been improper.

In *Hormel v. Helvering*, 312 U.S. 552 (1941), Justice Black explained that the normal rule that appellate courts would not consider issues not raised below rested on two factors. First, parties should have an opportunity to lay their entire case before the finder of fact. Second, litigants should not be surprised on appeal by new issues. *Id.* at 556; *see* Note, *Waiver of a Previously Unrecognized Defense: Must Lawyers be Seers?* 114 U. PA. L. REV. 451, 456-57 (1966). Having had Pass Word and CDA's contention that the APA had been violated fully presented to it, the Commission could hardly have been surprised when the licensees pressed the point on appeal. The waiver holding of the court below thus is unsupported by either of the policies buttressing the general waiver doctrine.[26]

The court of appeals' refusal to consider Pass Word and CDA's arguments that the right to functional separation guaranteed them by the APA had been denied must be condemned under the standards of *Curtis Publishing* and *Hormel*. Review by this Court is essential to ensure that

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[26]In *Hormel*, Justic Black, while recognizing the general waiver rule, emphasized that "such appellate practice should not be applied where the obvious result would be a plain miscarriage of justice." 312 U.S. at 558.

parties' rights are not casually deemed waived in the course of litigation.

III. The FCC Intermingled Prosecution and Adjudication in Violation of the APA

Although the court below, in view of its waiver holding, did not rule on Pass Word and CDA's contention that the participation of the agency's prosecutor in its decision violated the APA, another reason for this Court's review is to correct the Commission's restrictive application of Section 5(c) of the APA. The Commission did not deny that it had brought its prosecutor ex parte into the decisionmaking process; it only held, without citing any independent authority, that in the absence of an evidentiary hearing, the APA's separation of functions provisions were not applicable to its proceeding.[27] (App. 9c-11c.)

The APA contains no such exemption. By its terms, Section 5(c) applies to "every case of adjudication required by statute to be determined on the record after *opportunity for an agency hearing* . . . ."[28]

The legislative history of the APA confirms that all adjudications were intended to be included in the separation of functions provisions. In the Senate Judiciary Committee Print of 1945, *reprinted in* ADMINISTRATIVE PROCEDURE

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[27] Although as the Court recognized in Withrow v. Larkin, 421 U.S. 35, 52 (1975), the APA prohibits functional intermingling without regard to the presence of actual bias, the Commission's opinion reflects the prosecutorial bias of its author, particularly with regard to the dimsissal of Pass Word's and CDA's extensive record of meritorious service. See App. 85b-88b.

[28] Emphasis added. Section 312 of the Communications Act, 47 U.S.C. § 312, which governs revocations, contains an absolute grant of a hearing opportunity.

ACT - LEGISLATIVE HISTORY, 79th Cong., 1944-46 at 24 (1946), the Committee referred to Section 5(c) as applying to all "so-called 'accusatory proceedings.'" It did not suggest any other limits such as the conduct of an evidentiary hearing. In subsequent discussion of the limited statutory exemptions from the separation of functions requirements for initial licensing and similar proceedings, the same Committee emphasized that if even those cases became "accusatory" in nature, as this case certainly was, "[a]gencies should not apply the exceptions . . . ." S. REP. No. 572, 79th Cong., 1st Sess. (1945), *reprinted in* ADMINISTRATIVE PROCEDURE ACT - LEGISLATIVE HISTORY, 79th Cong., 1944-46 at 204 (1946). Congress' intent, therefore, was not restricted to formal hearing cases, but instead was to require that investigating and prosecuting in all accusatory cases be separated from agency decisionmaking.[29]

The concern of the drafters of the APA was that "'[a] man who has buried himself in one side of an issue is disabled from bringing to its decision that dispassionate judgment which Anglo-American tradition demands of officials who decide questions.'"[30] Although no evidentiary hearing took place below, the participation in the Commission's decisionmaking process of a staff member whose duty was to support revocation prevented Pass

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[29]The Department of Justice, in interpreting the APA, also concluded that Section 5(c) applied to any "*agency-initiated* modification or amendment of licenses. . . ." United States Department of Justice, Attorney General's Manual on the Administrative Procedure Act 51 (1947) (emphasis in original). *See also* Shulman, *Separation of Functions in Formal Licensing Adjudications*, 56 NOTRE DAME LAW. 351, 359-60 (1981); Davis, *Separation of Functions in Administrative Agencies*, 61 HARV. L. REV. 612, 636-37 (1948).

[30]REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE 56 (1941), *quoted in* Grolier, Inc. v. FTC, 615 F.2d 1215, 1219 (9th Cir. 1980).

Word and CDA from receiving the unbiased judgment required by the APA. The Commission's stated view that it does not consider itself obliged to follow separations of functions requirements where hearings are waived means that the problem will not be limited to this case; instead other licensees will be forced to undertake costly and otherwise unneeded evidentiary hearing proceedings in order to preserve their procedural rights under the APA to a decision untainted by the ex parte intervention of the prosecutor into the agency's decision.

CONCLUSION

For the foregoing reasons, review by this Court is necessary and this petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 1, 1982

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 81-1712

PASS WORD, INC. and RODNEY J. BACON
d/b/a COEUR D'ALENE ANSWERING SERVICE, APPELLANTS

v.

FEDERAL COMMUNICATIONS COMMISSION

ESTATE OF JENNINGS B. BACON, INTERVENOR

Appeal from an Order of the
Federal Communications Commission

Argued March 17, 1982
Decided April 2, 1982

Judgment entered this date ←

Harold David Cohen, with whom *Jack N. Goodman*, *Henry A. Solomon*, and *John M. Pelkey* were on the brief for appellants.

Lisa B. Margolis, Counsel, Federal Communications Commission, for appellee. *Stephen A. Sharp*, General Counsel, *Daniel M. Armstrong*, Associate General Counsel, and *Gregory M. Christopher*, Counsel, Federal Communications Commission, were on the brief for appellee.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Thomas H. Wall and *Alan C. Campbell* were on the brief for intervenor.

Before: BAZELON, *Senior Circuit Judge*, MACKINNON and GINSBURG, *Circuit Judges*.

Opinion *Per Curiam*.

PER CURIAM: Appellants, Pass Word, Inc. and Rodney J. Bacon d/b/a Coeur d'Alene Answering Service ("CDA"), held licenses in the Domestic Public Land Mobile Radio Service. Sole owner of CDA, Rodney J. Bacon owns 49.5% of Pass Word's stock and is its president and chief operating officer. The Federal Communications Commission ("FCC" or "Commission") revoked appellants' licenses based on a series of deliberate misrepresentations Bacon made in forms, correspondence, and pleadings over a three-year period. Our review of the record and consideration of appellants' arguments persuade us that the Commission's action must be affirmed.

Bacon concedes that he made numerous material misrepresentations in official communications to the Federal Communications Commission, including applications for additional facilities and construction permits.[1] After a competing applicant for the additional facilities brought Bacon's misrepresentations to the FCC's attention, the Commission entered an order requiring appellants to show cause why their operating licenses should not be revoked. Waiving their right to a hearing, appellants conceded the multiple misrepresentations and filed a mitigation statement. The statement urged that, in light of circumstances surrounding the misrepresentations, the economic repercussions on Bacon and his family, appellants' meritorious service record, and the impact on ap-

[1] Illustrative of Bacon's false representations, he fabricated a traffic load study showing units in service on channels not yet constructed. *See* Pass Word, Inc., 76 F.C.C.2d 465, 504-05 (1980).

pellants' customers, a sanction less stringent than license revocation was required. Finding that Bacon's repeated misrepresentations were knowing and deliberate, and that the factors proffered by appellants did not mitigate the "flagrant . . . disregard of licensee responsibility," the Commission ordered revocation of appellants' licenses as "the only appropriate remedy." *Pass Word, Inc.*, 76 F.C.C.2d 465, 519 (1980).[2]

Appellants challenge the FCC's action on several grounds. First, they claim that the Commission violated the separation of functions requirement of the Administrative Procedure Act, 5 U.S.C. § 554(d). They charge that the same staff members who investigated the allegations against appellants drafted the statements recommending revocation and denial of reconsideration, statements the FCC adopted as its decisions. Appellants first raised this objection in their April 1980 Petition for Partial Reconsideration, when alteration of the mode of proceeding in this case was impossible. However, appellants previously knew or should have known, particularly after the Commission's decision in *Mullin, Connor & Rhyne*, 41 Rad. Reg. (P&F) 1681 (1977), that it is the FCC's general practice not to require separation of functions after a waiver of hearing. *See also Amendments of Part I of the Commission's Rules Concerning Revocation and Cease and Desist Proceedings*, 25 Fed. Reg. 12602 (1960). Failure to interpose a timely challenge to the Commission's routine and published mode of proceeding precludes appellants from prevailing on this point. *See International Paper Co. v. FPC*, 438 F.2d 1349, 1357 (2d Cir.), *cert. denied*, 404 U.S. 827 (1971).

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[2] 47 U.S.C. § 312(a) authorizes license revocation for "knowingly made" false statements of the kind Bacon supplied to the Commission. *See also* 18 U.S.C. § 1001 (knowing false statement to federal agency is punishable by fine of not more than $10,000 or imprisonment of not more than five years, or both).

Appellants also claim that the revocation order rests upon the Commission's finding that the misrepresentations were part of a plan preconceived by Bacon to delay construction of the additional facilities. Appellants assert that nothing in the record warrants characterization of Bacon's multiple written misrepresentations as premeditated. Our reading of the Commission's decisions does not support appellants' contention that premeditation was the pivotal concern. Rather, the decisions indicate that revocation was ordered because the FCC found that Bacon had made a series of *knowing and deliberate* material misrepresentations to the agency.[3] We therefore need not inquire whether, had the Commission identified premeditation as critical to its decision, such a finding would have been supported by substantial evidence.

Finally, appellants assert that the FCC abused its discretion by refusing to consider lesser sanctions or evidence of mitigating circumstances. Again, we believe appellants misconstrue the FCC's decisions. The Commission did consider both the proffered mitigating circumstances and the proposed lesser sanctions. On the facts of this case, however, the Commission viewed revocation as the appropriate sanction. We cannot conclude, in view of Bacon's course of conduct, his repeated knowing and deliberate misrepresentations to the agency, that the FCC's order revoking appellants' operating licenses was an abuse of discretion.

For the foregoing reasons, the decisions of the Federal Communications Commission on review are

Affirmed.

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[3] *See supra* note 2.

APPENDIX B

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Revocation of the Licenses of
PASS WORD, INC.

Licenses of Stations KMM697, KOA271 KRS678 and KUC918 in the Domestic Public Land Mobile Radio Service and RODNEY J. BACON D/B/A COEUR D'ALENE ANSWERING SERVICE	Docket No. 20939
Licensee of stations KWU337 and KUO 646 in the Domestic Public Land Mobile Radio Service and In Re Applications of	Docket No. 20940
COURTESY COMMUNICATIONS, INC. Spokane, Washington	Docket No. 20941 File No. 20239–CD–P–(3)–76
PASS WORD, INC. Spokane, Washington	Docket No. 20943 File No. 20669–CD–P–(2)–76
RODNEY J. BACON d/b/a COEUR D'ALENE ANSWERING SERVICE Kellogg, Idaho	Docket No. 20943 File No. 20669–CD–P–76
RODNEY J. BACON D/B/A COEUR D'ALENE ANSWERING SERVICE Coer d'Alene, Idaho	Docket No. 20944 File No. 20014–CD–P–76

For Construction Permits in the Domestic Public Land Mobile Radio Service.

ORDER TO REVOKE LICENSES, TO TERMINATE COMPARATIVE PROCEEDINGS, AND TO PROCEED WITH DOCKET 20941

(Adopted: March 4, 1980; Released: March 12, 1980)

BY THE COMMISSION:

Introduction

1. By "Order to Show Cause and Memorandum Opinion and Order", Pass Word, Inc. (hereinafter "Pass Word") and Rodney J. Bacon d/b/a Coeur d'Alene Answering Service (hereinafter "Coeur d'Alene"), were directed to show cause why their licenses in the Domestic Public Land Mobile Radio Service (DPLMRS) should not be revoked. 61 F.C.C. 2d 410 (1976). Courtesy Communications, Inc., formerly Public Service Associates, Inc., had filed an application which is mutually exclusive by reason of electrical interference, with applications filed by Pass Word and Coeur d'Alene. Because substantial issues of a noncomparative nature were raised with respect to the Courtesy communications application, a second hearing on certain basic issues was designated to consider that application. In addition, a third hearing was ordered to resolve comparative issues between Courtesy and Pass World and Coeur d'Alene, in the event that the issues in the revocation proceeding were resolved in favor of either Pass Word or Coeur d'Alene. 61 F.C.C. 2d 410, 411.

2. Pass Word, Inc. (Pass Word) is a licensee in the Domestic Public Land Mobile Radio Service (DPLMRS) of the following stations, authorized to operate on the specified frequencies at Spokane, Washington: KMM 697 on 152.06, 151.18, 454.025 and 454.075 MHz; KOA 271 on 152.03 and 152.21 MHz; KRS 678 on 158.70 MHz; and KUC 918 on 35.22 MHz. Pass Word, Inc. was incorporated by Rodney Bacon's father, Jennings Bacon, in

1966. Jennings Bacon was president of Pass Word until July 1970, when at the age of 72, he suffered a severe stroke and was unable to manage the business. Rodney Bacon became President and Chief operating officer in July 1970. At year-end 1970 Jennings Bacon held a 90% ownership interest in Pass Word and Rodney Bacon held a 10% interest. Jennings Bacon's interest declined 5% per year and Rodney Bacon's increased 5% per year, until at year-end 1976, Jennings Bacon held 55% and Rodney Bacon held 45%. (Response to Question 6 and to 1(a), Forms 430). Jennings Bacon died in January 1978. An Application for transfer of control of Jennings Bacon's interest to the Executor of his Estate was filed by Pass Word.[1] Pass Word's 1978 Form 430, filed February 27, 1978, showed a 49.5% interest held by Rodney Bacon and a 50.5% interest involuntarily transferred to the Executor of the Estate.

3. Rodney J. Bacon d/b/a Coeur d'Alene Answering Service (Coeur d'Alene) is the licensee of the following DPLMRS stations, which are authorized to operate on the

[1] Jennings Bacon's will was found valid and accepted for probate by order of the Superior Court of the County of Spokane, Washington, on February 22, 1978. Phyllis Bacon, the wife of Jennings Bacon, was given a life estate in Jennings Bacon's stock in Pass Word. That interest includes rights to vote the stock, to receive dividends or payments arising from ownership of the stock, and to sell the stock and retain a life estate in the proceeds. At her death, the stock or the proceeds pass to Rodney Bacon. Phyllis Bacon was also given the approximately $1000 per month annuity of Jennings Bacon from the revenues of Pass Word. Pass Word filed a formal application dated January 3, 1978, for transfer of control of Jennings Bacon's interest in Pass Word to the Seattle First National Bank, Executor of the Estate of Jennings Bacon. By letter of January 9, 1978, counsel for Pass Word informed the Commission that Jennings Bacon died January 8, 1978. An informal application dated March 3, 1978, was made by Pass Word to transfer control of Jennings Bacon's interest in Pass Word to Seattle First National Bank, as Executor of his Estate. No other documents have been filed with respect to the transfer to date.

listed frequencies to serve Coeur d'Alene, Idaho: KWU 337 (formerly KUO 597, changed March 15, 1976) on 454.125 and 454.175 MHz; and KUO 646 on 35.58 MHz. Coeur d'Alene, Idaho is approximately 30 miles east of Spokane, Washington, Transmitters for these two stations. as well as for Pass Word's KMM 697, are located at Mica Peak, Idaho, approximately 9 miles east of Spokane. Rodney Bacon is and has been the sole owner of Coeur d'Alene Answering Service. Pass Word itself has no interest, direct or indirect in that RCC. However, Mr. Bacon is 49.5% stockholder, president and chief operating officer, and is directly responsible for the management of Pass Word. Certain activities of the two carriers are coordinated or at least involve a good deal of cooperation. For example, Pass Word operates a control point at the office of Rodney Bacon d/b/a Coeur d'Alene Answering Service, and 37 of Coeur d'Alene's subscribers are known to have been served on the facilities of Pass Word.

Events Leading to Show Cause Order

4. On October 9, 1973, Pass Word received a construction permit (CP) from this Commission, authorizing it to construct station KMM 697 on the frequencies 152.06, 454.025 and 454.075 MHz, at Mica Peak. By its terms the CP was to expire on June 9, 1974, if construction was not completed in accordance with the permit. Pass Word did not file any request for an extension of the construction permit nor has any such extension otherwise been granted. On June 6, 1974, Pass Word filed an FCC Form 403 pursuant to Section 21.212 of the Commission's Rules, seeking a license to cover its CP. In that application Pass Word stated that all the terms of the CP had been met and that the station was ready for operation. Rodney Bacon, as president of Pass Word, signed the application, certifying that "the statements in this application are true, complete,

and correct to the best of [his] knowledge and belief and are made in good faith." Relying on these representations, the Commission issued a license to Pass Word. On June 5, 1974, Pass Word informed by mail the Commission's Engineer-in-Charge in Seattle, Washington that construction had been completed in accordance with the terms of the CP, and that equipment and service tests would begin on 454.025 and 454.075 MHz of station KMM 697 on June 6 and June 7, 1974, respectively.

5. On January 28, 1974, Rodney J. Bacon d/b/a Coeur d'Alene Answering Service received a construction permit from the Commission, authorizing him to operate station KWU 337 (formerly KUO 597) on the frequencies 454.125 and 454.175 MHz at Mica Peak to serve Coeur d'Alene, Idaho. By its terms the CP was to expire on September 28, 1974, if construction was not completed in accordance with the permit. On June 6, 1974, Rodney Bacon filed an FCC Form 403 seeking a license to cover the CP, stating that construction had been completed on June 4, 1974. Relying on these representations, the Commission issued a license to Bacon on July 1, 1974. On June 5, 1974, Rodney Bacon informed the FCC's Engineer-in-Charge in Seattle, Washington, by a letter nearly identical to the one referred to in paragraph 4 above, that the construction of KWU 337's 454.125 and 454.175 MHz facilities had been completed on June 4, 1974, and that equipment and service tests would be conducted on June 10 and June 12, 1974, respectively.

6. Pass Word and Coeur d'Alene applied for additional frequencies on KMM 697 and KWU 337 in July 1975, approximately one year after they had submitted the Forms 403 and service and test notifications regarding the 454 MHz frequencies of KMM 697 and KWU 337. Subse-

quent amendments to and correspondence concerning the 1975 applications conflicted with statements made in Pass Word's and Coeur d'Alene's Forms 403, service and test notifications, and application load studies regarding the construction and operation of the 454 MHz facilities. On December 9, 1975, a competing applicant, Courtesy Communications, Inc., filed a "Petition to Institute Investigation and to Designate Application for Hearing". Courtesy alleged deliberate misrepresentations by Pass Word regarding the construction and operation of its 454 MHz facilities. Pass Word opposed Courtesy's "Petition" by a pleading filed March 8, 1976. Pass Word's "Opposition" raised further questions in regard to the actual construction and operation of the 454 MHz facilities and whether deliberate and knowing misrepresentations had been made to the Commission by Pass Word and Coeur d'Alene Answering Service.

7. As a result of the above events we instituted this show cause proceeding. 61 F.C.C. 2d 410, 411-416. When an applicant files a Form 403 requesting a license to cover a CP and notifies the Commission's Engineer-in-Charge that equipment and service tests are to be conducted, the applicant thereby states that construction of the facilities has been completed in accordance with the terms of the CP and that the station is ready to begin operations. Many questions concerning the construction and operation of the Mica Peak UHF facilities of these two licensees were raised. Evidence before the Commission also raised the questions whether Rodney Bacon, in his capacities as a principal of Pass Word and as sole owner of Coeur d'Alene Answering Service, (1) made false and misleading representations to the Commission, (2) submitted loading studies showing traffic on stations which were not in operation, and (3) ignored several opportunities to clarify

the record and to correct false statements previously made. Mr. Bacon's disclosures in *Blue Mountain Mobile Phone Co.*, FCC Dockets 20209–20210, did not complete the record nor result in the correction of the station files and applications of Pass Word and Coeur d'Alene Answering Service, and certainly do not excuse the totality of his conduct. Every applicant certifies on his application that:

> "I certify that the statements in this application are true, complete, and correct to the best of my knowledge and belief, and are made in good faith."

Printed on the application near this certification is the following statement:

> "Willful false statements on this form are punishable by fine and imprisonment. U.S. Code, Title 18, Section 1001."

The Commission must depend on the integrity and representations of its licensees and a breach of that trust or willful false statements may be grounds for the revocation of licenses and character disqualification. See *FCC v. WOKO, Inc.*, 329 U.S. 223 (1946), and *Charles P.B. Pinson, Inc. v. FCC*, 321 F.2d 372 (D.C. Cir. 1963). This is as essential to common carrier applications and reports as it is to those of broadcasters. This proceeding was initiated to offer Pass Word and Coeur d'Alene Answering Service an opportunity to show cause why the licenses for their stations should not be revoked or further action should not be taken.

8. The issues designated were:

> 41. (a) To determine the facts surrounding the construction and operation of the 454 MHz facilities of station KMM 697,

authorized by this Commission on October 9, 1973, and whether the licensee was diligent in constructing and operating the facilities: and

(b) To determine if there were any misrepresentations or a lack of candor by Pass Word in its application for a license to cover the construction permit for KMM 697, in subsequent filings relating to that application, and in the application and associated pleadings of Pass Word in File No. 20604–CD–P–(2)–76.

42. (a) To determine the facts surrounding the construction and operation of 454 MHz facilities of station KWU 337, authorized by this Commission on January 28, 1974, and whether the licensee was diligent in constructing and operating the facilities; and

(b) To determine if there were misrepresentations or a lack of candor by Rodney J. Bacon in his application for a license to cover the construction permit for KWU 337, and in his application, File No. 20014–CD–P–76; and

(c) To determine whether, in light of the information giving rise to the preceding questions in this and the preceding paragraph, the respondents possess the requisite qualifications to continue as licenses of the Commission.

9. Courtesy Communications, Inc. was permitted to intervene as a party in the revocation phase of this pro-

ceeding. Before the scheduled date for hearing, Respondents requested permission to file a late waiver of their right to hearing and to submit a statement pursuant to FCC Rules and Regulations, Section 1.92(b). Permission was granted. (FCC 77M–280, released February 11, 1977). Respondents waived their right to hearing and submitted a "Statement", signed by Rodney Bacon and dated March 12, 1977. The Administrative Law Judge certified the record to the Commission for Decision. (FCC 77M–750, released April 19, 1977). FCC Rules and Regulations, Section 1.92(c). The Common Carrier Bureau conducted further investigation upon the designated issues. FCC Rules and Regulations, Sections 0.91(a), (g), (h), 1.92(d). Respondents submitted responses to requests for information by the Bureau dated April 1, 1977 and September 26, 1977.[2]

Summary

10. Pass Word, licensee of KMM 697, KOA 271, KRS 678 and KUC 918, has received construction permits and licenses from the Commission over a period of years

[2]Letter dated April 1, 1977, signed by counsel for Rodney Bacon and two attachments. The first attachment is an index of all Trial Staff Interrogatories to Pass Word and to Coeur d'Alene matched to material appearing in the March 12, 1977, "Statement". The second attachment is an annotated copy of the Statement, with a line-by-line reference to the interrogatories and table of the exhibits to the Statement, all matched to the interrogatories. Citations to material in this set of responses are made by reference to the Trial Staff Interrogatory by Respondent, Set, and number (i.e., PW Set I, 2). Bureau Staff requests for information were made to Pass Word and Bacon by letter dated August 31, 1977. Respondents answered on September 26, 1977. Citations to responses in this material are made by identifying the Bureau request number (i.e., CCB, Item 1).

authorizing it to provide radio common carrier service. In doing so, it has filed various reports and forms, and has made other representations and statements to the Commission in the course of its activities as a licensee, permittee and applicant. Rodney J. Bacon d/b/a Coeur d'Alene Answering Service, licensee of KWU 337 and KUO 646, has filed similar documents with the Commission in his capacity as licensee, permittee and applicant. Among those documents are forms and letters filed with the Commission certifying the operative status of facilities for which construction permits had been issued. As detailed herein, the Commission finds that Pass Word and Bacon filed documents with the Commission in 1974 representing that construction of certain facilities had been completed in accordance with the term of the construction permit, and that equipment and service tests would begin shortly, when in fact the facilities were not ready for operation. The record establishes that equipment essential for operation of the facilities was not on hand when the representations were made, and that construction was completed and service commenced long after the expiration of the construction permits. Moreover, the record establishes that Bacon, individually and as the chief operating officer of Pass Word, concealed facts in correspondence, pleadings and forms filed over a three-year period regarding construction of the facilities and the Commission's inquiry pertaining thereto. The facts establish that the concealment was deliberate and that Bacon deliberately made misrepresentations to the Commission. Furthermore, the facts cited in mitigation are unpersuasive on the record presented here. The Commission accordingly concludes that revocation of all existing licenses, and denial of all pending applications, is the appropriate remedy.

Findings of Fact

Alleged and Actual Construction and Operation of the 454.025 Mhz and 454.075 MHz Facilities of Pass Word.

11. Pass Word Station KMM 697 was granted a construction permit for 152.06 MHz, 454.025 MHz and 454.075 MHz frequencies to build facilities capable of providing mobile radio service (File No. 636–C2–P–(3)–73) on October 9, 1973. By the terms of the permit, construction was required to be completed by June 9, 1974, or the permit would expire on that date. Pass Word submitted an FCC Form 403, dated June 4, 1974, and signed by Rodney J. Bacon. FCC Form 403 is the application for a license to cover construction permit, whereby operating authority is obtained. Mr. Bacon completed Section 3(c), "When was the construction specified in 3(a) completed?" by writing in "June 4, 1974". Section 3 had been completed with a check mark in the box labelled "yes" in answer to the questions:

(d) Is the station now ready for operation?

(e) Have all the terms of the construction permit(s) listed in 3(a) been met?[3]

Bacon submitted on behalf of Pass Word, Inc. a service and equipment test notification dated June 4, 1974, regarding the 454.025 MHz and 454.075 MHz channels, to the FCC Chief Engineer in Seattle, Washington. The notification stated that pursuant to FCC Rules and Regulations, Sections 21.212(a)(1) and 21.212(b)(1), ser-

[3]Shortly after the permit grant, counsel for Pass Word completed the Form 403, leaving item 3(c) and the certification for Pass Word to complete. "Statement", p. 29.

vice and equipment tests would be conducted on June 6 and 7, 1974. Subsequently, Pass Word made conflicting representations to various Commission officials regarding the construction and operation of the Station KMM 697 454.025 MHz and 454.075 MHz facilities.

12. On February 11, 1975, in FCC Dockets 20209–20210, *Blue Mountain Mobile Phone*, Rodney Bacon testified that Pass Word's two UHF frequencies (454.025 and 454.075 MHz) were *not in operation* due to the lack of wireline facilities. (Docket Nos. 20209–20210 Tr. 349)

13. On July 10, 1975, Pass Word filed an application for two additional channels for Station KMM 697, 454.250 MHz and 454.300 MHz. (File No. 20604–CD–P–(2)–76) the application was returned by the Common Carrier Bureau as defective for failure to provide a traffic load showing for the previously authorized 454.025 and 454.075 MHz frequencies, as required by the Commission's Rules, Section 21.516. On October 6, 1975, Pass Word resubmitted its application, again without the required traffic study. Instead, Pass Word requested a waiver of the requirement, stating that while the facilities had been constructed, they were not operational due to "inordinate delays in the furnishing (by General and Bell) of control circuits. Such circuits will be furnished late this year, according to the wireline carriers." The traffic showing was promised "reasonably soon after activation of the channels." The Common Carrier Bureau denied the request for waiver by letter on October 21, 1975, and instructed Pass Word to amend its application within thirty days. By letter dated November 19, 1975, Pass Word requested a 120 day extension of time within which to comply with Section 21.516. Pass Word stated that "the two channels . . . were activated earlier this month at great ex-

pense to the licensee." Pass Word attributed the necessity for an extension to delays in the delivery of mobile units, which were promised within the next four to twelve weeks. It was stated that beause of the lack of units, service was being provided to only a "limited number" of units. An extension was granted until February 29, 1976. After further extensions, more than a year after the application and two years after expiration of the CP, a load study was submitted by Pass Word on June 11, 1976, showing five mobile units on 454.025 MHz and 454.075 MHz each.

14. Courtesy Communications filed a "Petition to Institute Investigation and to Designate Application for Hearing", dated December 9, 1975. Courtesy alleged that Rodney Bacon willfully and knowingly misrepresented material facts in Pass Word's June 1974 application to cover construction permit and in the service and equipment test notification of June 1974. The Courtesy petition was primarily based upon the assertions of Pass Word in its November 19, 1975, letter that the 454.025 MHz and 454.075 MHz channels had finally been activated in November 1975. Pass Word stated in its "Opposition", filed March 8, 1976, that "there is no dispute that *two* such base channels (UHF) were not activated *until* mid-November 1975" (Emphasis added), but that the delay in construction had been disclosed in Dockets 20209–20210, *Blue Mountain Mobile Phone Co.* In its "Opposition" Pass Word denied any knowing or willful misrepresentations and claimed that Rodney Bacon "reasonably believed that construction had been 'completed'" on June 4, 1974, and that he filled in that date on the Form 403 "on the basis of good faith beliefs and understandings." Attached to Pass Word's Opposition was an affidavit of Rodney Bacon. The affidavit stated that Bacon was familiar with Courtesy's "Petition to Institute Investigation." The affidavit stated that Bacon received from his counsel a

prepared Form 403 prior to June 9, 1974, "completed in all respects except for the date of completion of construction" which he "was instructed to fill in", and that he was without counsel between March 1974 and September 1974. Bacon also outlined in that affidavit the progress in construction of the 454.025 and 454.075 MHz facilities as of June 4, 1974 as follows:

> *One UHF station was on the site ready for construction. . . . The other* UHF station was *In Spokane,* also ready for construction . . . *All other parts* such as coaxial cable, cable fittings, antenna mounting hardware, antennas, clamps, nails, protective conduit, etc., etc., *had been collected or,* in a few minor instances, *located for immediate pick-up.* All that remained in my estimation at that time, was a quick dash to the site, picking up these items on the way, and a straightforward antenna placement and we'd be in business that afternoon. *As I understood the term* at that time, *the foregoing* construction *was sufficient to justify* inserting the date *6/4/74 as the date of construction.* Furthermore, I *understood the connecting of the phone lines was merely a formality, to be accomplished* at the most *within 24—48 hours.* On the following day, *I gave service test notification fully expecting that lines would be connected* and the *stations* ready in all respects to *begin operation* on all three channels *by the service test commencement date.* During this period I contacted telephone company personnel and was incensed to learn from them that the lines would not be connected in time. *Subsequent to June 7,* I had *numerous contacts with General Telephone,* but *was unable to obtain satisfaction for more than a year.* (Emphasis added)

15. By his letter dated *April 5, 1976*, attached to a letter of counsel dated April 8, 1976, Rodney Bacon notified the Mobile Services Division of the Common Carrier Bureau that Pass Word's *March 8, 1976* "Opposition" was "not accurate" as to the date of activation of the two UHF channels. Mr. Bacon stated that only the 454.025 MHz channel "is on the air" and that the 454.075 MHz channel couldn't yet be activated because of "continued inability to acquire a landline circuit between the control point and the transmitter site at Mica Peak." (The March 8, 1976, "Opposition" and November 1975 amendment to Pass Word's further application had stated that *both* UHF channels were activated in *November 1975.)* Mr. Bacon further stated in his April 5, 1976 letter that he did not "notice" the erroneous statement in reviewing a draft of Pass Word's "Opposition"; that his counsel had understood both channels were activated in November 1975; and that the incorrect statement and "any additional erroneous statement which might have been made" (none were identified) concerning the status of the two UHF channels were made "as a result of a misunderstanding and not with an intent to deceive." No amendment of Pass Word's "Opposition" was filed.

16. Courtesy Communications filed a "Supplement to Petition to Institute Investigation" dated April 15, 1976, in which inconsistencies in statements by Pass Word regarding the two UHF channels were discussed. Courtesy alleged that the incorrect statements in the March 8, 1976, "Opposition" could not have been inadvertent for essentially two reasons. First, the same incorrect statement was made in Pass Word's November 19, 1975 letter to the Common Carrier Bureau. Second, Mr. Bacon swore in Pass Word's March 8, 1976 "Opposition" that he was familiar with Courtesy's December 1975 Petition to Institute Investiga-

tion, which relied upon and discussed Pass Word's November 19, 1975, letter and the statement therein that both channels were activated in November 1975. In October 1976, our order to show cause naming Pass Word and Rodney Bacon d/b/a Coeur d'Alene as respondents was issued.

17. In his "Statement" submitted in lieu of hearing and in written response to staff investigatory requests, Bacon provided dates of construction and operation of the 454.025 MHz and 454.075 MHz channels different than those given before this proceeding was instituted.

18. In Pass Word's amendments to its July 1975 application for additional frequencies on KMM 697, in correspondence with the Commission, and in the affidavit of Bacon attached to the Pass Word "Opposition" of March 1976, Bacon blamed the late construction and operation of Pass Word's 454.025 MHz and 454.075 MHz frequencies upon delays and failures by General Telephone Company of the Northwest to install necessary control circuitry. (Paragraphs 12–15, supra) In his "Statement", Bacon offers extensive comment upon his unavailing efforts to obtain control circuitry, complaining of unreasonable delays and failures to respond to his requests.[4] In fact, control circuitry necessary for the operation of 454.025 MHz was not ordered by Bacon before July 1975 from General and Pacific Northwest Bell Telephone Co.[5] Control circuitry necessary for the operation of 454.075 MHz was not ordered by Mr. Bacon until March 1976. (Statement, p.

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[4]Statement, pp. 13-15, 20-22, 30, 34-44, 47-49, 62-65.

[5]P. W. Set III, 2. Materials referenced by that response were pp. 38, 39 of the Statement and Exhibits 12-14 appended thereto. Exhibit 12 is a letter signed by Bacon, dated June 6, 1976, stating Bacon's intent to request a circuit sometime in the "next few months" and asking for in-

46) The circuitry for 454.025 MHz was installed by October 30, 1975, and for 454.075 by April 20, 1976. (Statement, p. 43, 46) It is apparent that there was no "unavailability" of control circuitry. Rather, Bacon did not order the control circuitry for the 454.025 MHz and 454.075 MHz channels until 13 months and 21 months, respectively, after the expiration of the construction permit for those frequencies.

19. Late construction and operation of the Pass Word 454 MHz facilities was attributable not only to Bacon's delay in ordering necessary control circuitry, but also to his delay in ordering and installing necessary station equipment. Bacon states that he originally planned in 1973 to switch the 152.06 MHz base stations to the 454.025 MHz and 454.075 MHz frequencies when phone circuitry was available for the 454 MHz frequencies, but that by *June 1975* he decided it was better to get new stations for Pass Word's 454 MHz frequencies. (Statement, pp. 16, 40) The base transmitters were not ordered until June 30, 1975 and were received September 30, 1975 (Statement, p. 41). When asked to provide the installation dates for the transmitters for 454.025 MHz and 454.075 MHz, Pass Word referred to three pages of the "Statement" (pp. 43, 44, 46) wherein the only reference to a base transmitter was that on October 30, 1975 the control circuit for the 454.025 MHz frequency was installed and hooked up to the base transmitter.[6] Bacon states that when the control circuit for 454.075 was installed on April 20, 1976, he had a technician spend considerable time "hooking it up to

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formation. Exhibit 13 is a letter signed by Bacon, dated July 21, 1975, requesting that the circuit "ordered" six weeks ago be installed by August 29, 1975. While the Statement, pp. 39, 41, identifies June 6, 1976 as the order date, Exhibits 12 and 13 indicate that order date was July 21, 1975.

[6]P.W. Set IV, 1(a), 4(a). Statement, p. 43.

454.075 MHz" (Statement, pp. 46—47). We find that the base transmitter for 454.025 was installed no earlier than October 30, 1975 and 454.075 no earlier than April 20, 1976. Antennas were not ordered until July 29, 1975. They were received October 1, 1975 and installed October 14—15, 1975 according to Bacon. (Statement, p. 42) Bacon did not *begin* to order the base station equipment necessary for the construction and operation of Pass Word's 454 MHz facilities until one year after the expiration of the CP. We find that necessary station equipment was not installed before October 30, 1975 for 454.025 MHz and no earlier than April 20, 1976 for 454.075 MHz, or sixteen and twenty-two months after expiration of the CP.

20. While the installation dates of certain station equipment and facilities necessary for the operation of Pass Word's 454 MHz facilities are known, the date those frequencies were actually put into service is not known. The Bureau made specific requests to Pass Word to provide the date that each of the 454 MHz channels were capable of providing service and that service was actually provided. In response, Pass Word referred to certain pages in its Statement and other material not supplying a direct answer. Thus, in answer to the question when was service available on 454.025 MHz, Pass Word referred to the portion of its Statement indicating the date control circuitry was installed, October 15, 1975. (PW III, 7; Statement, pp. 43, 44) In response to the question when was service first provided, Pass Word referred to the portion of its Statement giving the date the first customer mobile unit was installed, February 24—25, 1976 (PW III, 8; Statement, p. 46) In response to the question when was service first available on 454.075 MHz, Pass Word referred to the portion of its Statement indicating the date con-

trol circuitry was installed, April 20, 1976. (PW III, 9; Statement, p. 46) And in response to the question when was service first provided, Pass Word referred to the por- stated that service was first provided between April 21 and 29, 1976. (PW III, 10) Since Pass Word Station KMM 697 did not maintain a log showing the time and destination of each transmission, as required by FCC Rule 21.208(g)(2), it is not possible to determine from station logs when service was actually first provided on those channels. The equipment on those channels is automatic and calls on it cannot be ticketed. Pass Word does not know if a waiver of 21.208(g) was ever granted for the 454 MHz frequencies. (PW Set I, 1) In June 1976 Pass Word submitted a traffic load showing for the 454 MHz facilities, in connection with its application for additional frequencies on Station KMM 697, showing five units each on 454.025 and 454.075 MHz. (Paragraph 13, supra) In response to the Bureau's requests for information regarding the number of customers and units on Pass Word's frequencies between 1970 and 1977, Pass Word stated that it was unable to give "separate figures" for customers and units on 454 MHz frequencies in 1976, giving no figures. (CCB, Item 12) Pass Word showed 10 customers and units each for 454.025 and 454.075 MHz in 1977 with the caveat that there "may be some double-counting" of customers. (CCB, Item 12) It was not stated whether the double-counting was between the two 454 Mhz frequencies, among all of KMM 697's frequencies, or among all of Pass Word's frequencies. Accordingly, we find that service on Pass Word's 454 MHz frequencies was not provided before February 1976 on 454.025 MHz, or April 20, 1976 on 454.075 MHz, and that service might not have been provided until some time in 1977 or even later on either channel.

21. Bacon gave service and equipment test notification by letter on June 5, 1974, that tests would commence on June 6 and 7, 1974 for the 454.025 and 454.075 MHz channels. In fact, tests were not conducted. (PWIII, 13) Bacon stated in his affidavit, appended to Pass Word's March 1976 "Opposition", that he fully believed in June 1974 that the tests would begin as stated in the notification. In March 1976 Bacon asserted that he intended in June 1974 to commence testing on the noticed dates, by affidavit in a pleading to the Commission; and affirmatively stated that testing would take place on the noticed dates in June 1974. In his "Statement", however, Bacon alleges that he understood in June 1974 that the Commission's Rules required only that the tests be conducted sometime after the date identified in the notification and that he did not understand they must begin on the noticed dates.

Alleged and Actual Construction and Operation of the 454.125 MHz and 454.175 MHz Channels of Rodney J. Bacon, d/b/a Coeur d'Alene Answering Service.

22. On January 28, 1974, Rodney Bacon d/b/a Coeur d'Alene Answering Service (hereinafter Coeur d'Alene) Station KWU 337, was granted a construction permit for 454.125 MHz and 454.175 MHz frequencies to build facilities capable of providing mobile radio service. (File No. 4509—C2—P—(2)—72) By the terms of the permit, construction was required to be completed by September 28, 1974, or the permit would expire on that date. Coeur d'Alene submitted an FCC Form 403, dated June 6, 1974 and signed by Rodney Bacon. Bacon completed Section 3(c), "When was the construction specified in 3(a) completed?" by writing in "June 4, 1974." Section 3 was further completed by checks in the boxes labelled "yes" in answer to the questions:

(d) Is the station now ready for operation?

(e) Have all the terms of the construction permit(s) listed in 3(a) been met?[7] Bacon submitted a service and equipment test notification dated June 5, 1974, to the FCC Chief Engineer in Seattle, Washington. That notification stated that pursuant to FCC Rules and Regulations, Sections 21.212(a)(1) and 21.212(b)(1), service and equipment tests would commence on June 10, and 12, 1974, for the 454.125 MHz and 454.175 MHz channels of Station KWU 337.

23. Approximately ten months after the expiration of the CP for the 454.125 and 454.175 MHz frequencies, Coeur d'Alene filed an application dated July 5, 1975, to add the frequency 454.200 MHz, to add transmitting equipment, and to obtain authority for an additional 50 mobile units on KWU 337. (File No. 20014–CD–P–76) Attached to this application was a "Description" of "Units in Service" on the 454.125 and 454.175 MHz channels. Twenty-five units were recorded as in service and forty-nine orders for service were indicated as being held. Attached to the application was a document labelled "Traffic Study", showing 12 mobile units in service on 454.125 MHz and 13 units in service on 454.175 MHz between June 9, 1975, and June 15, 1975. By letter dated September 19, 1975, the Common Carrier Bureau notified the applicant that the load study showing, pursuant to Section 21.516, did not indicate any congestion on the UHF channels that would warrant the grant of an additional channel. In addition, the Bureau asked for an explanation

[7]Shortly after the permit grant, counsel for Coeur d'Alene completed the Form 403, leaving item 3(c) and the certification for Bacon to complete.

as to why 49 held orders were not presently being served. An amendment to the application, signed by Rodney Bacon, was filed on October 28, 1975, wherein it stated:

> The reason why the 49 held orders are not being served at this time is due to the lack of adequate control circuitry between applicant's transmitters at Mika Peak and the control point . . . There is only one control circuit between such locations. *For the past year applicant has been trying to obtain additional control circuits* from General Telephone Company. Applicant has received *firm assurances from General that installation will be completed on or before Thursday, October 20, 1975.* (Emphasis added)

As a result of this explanation, the Common Carrier Bureau informed applicant on October 30, 1975, that the application would be held in a pending status for three months.

24. Some five months later, a further amendment was filed on April 1, 1976, signed by Bacon. It was stated therein:

> *454.175 is in service . . . 454.125 is awaiting provision of control circuits* by General Telephone and this should be virtually immediate. *Every effort to secure these circuits as soon as possible has been made* and applicant will continue to pressure General Telephone to install these circuits as soon as possible. Applicant is presently serving 37 units on an associate's facilities which have a second dispatch point in Coeur d'Alene at applicant's office. This arrangement was established because of the congestion of the associate's facilities and the difficulties involved with dispatching calls from two locations.

> Therefore, it has been planned that all of these customers are to be transferred to the applicant's 454.125 and 454.175 MHz facilities. (Emphasis added)

25. Another amendment, dated April 13, 1976, and signed by Rodney Bacon, was filed by Coeur d'Alene. It was stated therein:

> . . . there appears to be a variance between the information submitted with the original application and the actual operation of KUO 597 (now KWU 337). This amendment is intended to supplement and clarify . . . Pass Word, Inc. operates 152.18 MHz on Mica Peak, Idaho . . . Approximately 132 units were being served on 152.18 at the time of the Coeur d'Alene Answering Service's application for 454.200. Of these units, 25 were local Coeur d'Alene customers. When applicant filed for 454.200, applicant planned to transfer these 25 Coeur d'Alene VHF users to the UHF channels 454.125 and 454.175 on which it had been authorized to operate, because 152.18 was thoroughly overloaded . . . These 25 units were the "units in service" on Coeur d'Alene Answering Service's application for 454.200. . . . Likewise the April 1 amendment referred to the March 1976 traffic on 152.18 through Coeur d'Alene of 37 local Coeur d'Alene units in service at that time. . . *Frequencies 454.125 and 454.175 were not in operation at the time the application was filed.* . . inception of service on 454.125 and 454.175 was *delayed because of the lack of landline control circuits to* Mica Peak. The first of these was installed for 454.175 in November of 1975 and the second, *for 454.125 has been promised for July 1976.* (Emphasis added)

A loading study was attached to the amendment showing one unit in service on 454.175 MHz.

26. Pass Word's "correction" to its March 1976 "Opposition" to Courtesy's "Petition to Institute Investigation" was made by letter dated April 5, 1976. (See Para. 15, supra) Bacon filed the amendment explaining the variances between Coeur d'Alene's 1975 application for an additional channel and the actual operation of Coeur d'Alene's 454 MHz channels (Para. 25, supra) on April 13, 1976. Both were filed approximately a month after Pass Word filed its "Opposition" to Courtesy's "Petition to Institute Investigation".

27. In his "Statement" and in written responses to Bureau investigation, Bacon provided a different version of the actual dates of construction and operation of Coeur d'Alene's 454 MHz channels than in documents previously filed with the Commission.

28. In documents signed by Bacon and submitted to the Commission, the late construction and operation of the 454.125 and 454.175 MHz channels were attributed to Coeur d'Alene's inability to obtain control circuitry from General Telephone:

> For the past year applicant has been trying to obtain additional control circuits from General Telephone Company . . . (Amendment dated October 28, 1975, to Coeur d'Alene application for additional frequency. See Para. 23, supra)
>
> Every effort to secure these circuits as soon as possible has been made and applicant will continue to pressure General Telephone. (April 1, 1976 amendment to Coeur d'Alene application for additional frequency. See Para. 24, Supra)
>
> Frequencies 454.125 and 454.175 were not in

> operation at the time the application was filed. . . was delayed because of the lack of land line control circuits . . . the first was installed for 454.175 in November of 1975 and the second, for 454.125 has been promised for July 1976. (April 13, 1976 amendment to Coeur d'Alene application for additional frequency. See Para. 25, supra.)

Bacon in his "Statement" attributes the delay in construction and operation of Coeur d'Alene's 454 MHz frequencies to delays and failures by General Telephone to install circuitry as promised or in a timely manner.[8] In fact, control circuitry for the 454.125 and 454.175 MHz channels was not ordered until after the expiration of the CP for those channels, that is until after September 28, 1974. In response to a Bureau staff request for the order dates of control circuitry, Coeur d'Alene responded that circuitry for the 454.175 MHz frequency was ordered by telephone in June 1975 (CdA III, 1(d), Statement pp. 38–39) and for 454.125 MHz "on or before March 5, 1976" (CdA III, 1(b) Statement, p. 46). Thus it was at least 12 months and 21 months *after* the date construction was alleged to have been completed in the Form 403 that control circuitry was even ordered. Circuitry for the 454.175 MHz channel was installed November 12, 1975 (Statement, p. 44: CdA III, 1(c)) and for the 454.125 MHz on October 1, 1976 (Statement, pp. 47–49; CdA III 1(a)). We find that the late construction and operation of the Coeur d'Alene 454 MHz channels was occasioned not by unavailability of control circuitry, but by Bacon's failure to order such facilities on a timely basis. Not only did Bacon fail to secure those necessary facilities upon a timely basis, but Bacon represented to the Commission in October 1975 that he

[8]Statement, pp. 13-15, 20-22, 30, 34-44, 47-49, 62-65.

had been attempting to obtain circuitry from General for the Coeur d'Alene channels for a year, when in fact he had ordered one channel only three months before and did not order the second until some 4 1/2 months later.

29. The late construction and operation of the 454.125 MHz and 454.175 MHz channels were due not only to Bacon's failure to install control circuitry, but also to Bacon's delay in ordering and installing essential base station equipment. The base transmitter was ordered on June 30, *1975,* for the 454.125 MHz channel, received September 30, *1975,* and installed October 1, *1976.* (CdA II 1(a)(B); Statement p. 41, 49; CdA IV, 1) While the base transmitter for the 454.175 MHz station was ordered in November 1973 and received soon thereafter (Statement, p. 17) it was not installed until October 30, 1975. (Statement pp. 43–44; CdA IV, 4, 5) Antennas were not ordered until July 29, 1975. They were received October 1, 1975 and installed October 14–15, 1975. (Statement, p. 42) All of the base station equipment was ordered a year after the expiration of the CP, with the exception of the transmitter for 454.175, which was installed more than a year after expiration of the CP.

30. The 454 MHz channels of Coeur d'Alene were not constructed and ready to operate until at least 13 and 24 months after the expiration of the CP on September 28, 1974. In his "Statement" and in response to Bureau staff requests Bacon states that service was available on 454.175 MHz facilities by November 12, 1975 and on 454.175 MHz facilities by October 1, 1976. (Statement pp. 44, 48–49; CDA III, 2, 4) The first mobile unit for 454.175 MHz was installed February 24, 1976, and service was not actually provided until March 4, 1976 (Statement, p. 46; CdA III, 5) or some 17 months after the expiration of the CP. In response to Bureau staff inquiry regarding the first date

service was actually provided on 454.125 MHz, Coeur d'Alene responded on October 19, 1976, that facilities were activated on October 1, 1976 and that a mobile unit was installed February 1976 for 454.175 which was also capable of operating on 454.125 (CdA III, 3; Statement pp. 46, 49) In response to an inquiry by the Bureau staff, Coeur d'Alene responded that in 1975 no customers and no units were served on 454.125 or 454.175, that in 1976 no customers or units were served on 454.125 but 3 customers and units were served on 454.175, and that in 1977, 454.125 served 24 units and 454.175 served 7 units. (CCB, Item 13) We find that until sometime in 1977 no customers were served on 454.125 MHz and that 454.175 served no customers before March 1976. However, the loading study submitted on July 5, 1975, showing 12 units on 454.125 MHz and 13 units on 454.175 MHz, represented that the 454 MHz facilities were in operation and providing service when the channels had not yet been yet been constructed.

31. Bacon gave service and equipment test notification by letter dated June 5, 1974, that test would commence on June 10 and 12, 1974, on the 454.125 MHz and 454.175 MHz channels. In fact, tests were not conducted. (CdA III, 6) In his "Statement", Bacon claims he understood in June 1974 that the Commission's Rules required only that the tests be conducted sometime after the date identified in the notification and that he did not understand that they must begin on the noticed dates. (Statement, p. 27)

Explanations Given for Late Construction and Operation

32. Bacon offers several explanations in his "Statement", submitted with his waiver of hearing, for the late construction and operation of the four Pass Word and Coeur d'Alene 454 MHz channels. Bacon explains that

financial difficulties made equipment purchases difficult, forced him to do much of the necessary planning and construction of the 454 MHz channels, plus two additional channels, and forced him to assume non-managerial duties in addition to his normal managerial duties. Bacon claims various difficulties and disruptions beyond his control contributed to the late construction, but maintains he proceeded as expeditiously as possible and with no intent to delay construction. Bacon attributes the late construction and operation of the 454 MHz channels in part to a lack of cooperation on the part of the telephone companies in providing control circuitry. Finally, Bacon cites his youth and inexperience in the communications business and parental illness as factors in the late construction and operation of Pass Word's and Coeur d'Alene's 454 MHz channels.

Financial Difficulties

33. Bacon lists several sources of *Pass Word's* financial difficulties. In his "Statement", Bacon identifies a strike between October 20, 1968 and November 20, 1968, requiring the hiring of thirteen additional persons to replace striking employees, as the cause of "several thousand dollars" extra expenses and of employee turnover which produced higher labor costs for "nearly a year." Bacon also cites "rising costs, legal costs in connection with obtaining Station KMM 697 and cash drain from KMM 697's start-up expenses" as the source of "heavy pressure" on Jennings and Rodney Bacon in 1969 and 1970. Bacon identifies his January 1972 purchase of the Loomis telephone answering service in Spokane as "an enormous burden for an extensive period." Bacon cites a large down payment, debt service on the acquisition, delinquencies on the acquired service's accounts, high labor costs in restaffing the acquired business, and in-

creased telephone company tariff rates associated with consolidation, as burdens imposed by the acquisition. (Statement, pp. 4–7)

34. In spite of the cited heavy financial burdens upon Pass Word, Bacon applied for six VHF and UHF frequencies for both Pass Word and Coeur d'Alene Answering Service in mid and late 1972 (152.06, 454.025, 454.075, 454.125, 454.175, and 35.58 MHz) Further, when the 454 MHz facilities had not yet been constructed and the construction permits had expired, Pass Word and Coeur d'Alene applied for three additional frequencies (454.250, 454.300, and 454.200 MHz) in July 1975.

35. The balance sheets, federal tax returns and income statements of Pass Word indicate that indeed Pass Word suffered difficulties between 1970 and 1974. The Coeur d'Alene tax returns, balance sheets, and income statements indicate that Coeur d'Alene suffered no losses and accumulated retained earnings since its inception in 1973. This financial material was submitted in response to a request of the Bureau staff. (CCB, Items 1–4)

36. We find that as to any financial difficulties or cash shortage of Pass Word which existed on or after the dates construction permits were granted for the 454 MHz channels (October 9, 1973 and January 28, 1974), the 1968 Pass Word strike and 1970 start up expenses of Pass Word's Station KMM 697 were too remote in time to be a cause or precipitating factor. Pass Word's taxable income and net operating income rebounded slightly in 1971, and then declined significantly in 1972, after Bacon's acquisition of the Loomis answering service in Spokane, was depressed through 1974, then rose.[9]

[9]Pass Word's taxable income as reported in federal returns was negative or modest from 1970-1974, but was much more substantial in 1975 and 1976. Pass Word's net operating income, or cash receipts less

37. We find that the 1972 acquisition of the Loomis answering service by Bacon for Pass Word and the resultant debt precipitated the cash shortage Pass Word suffered in 1974. Inspection of Pass Word's balance sheets, income statements and tax returns, indicate that the debt service associated with the acquisition, and not increased labor costs, telephone costs, or delinquencies of the new business as alleged by Bacon, created Pass Word's financial difficulties.

38. The difference between total services charged and cash receipts in Pass Word income statements (or delinquent accounts demonstrates that the former Loomis customers' failure to pay their accounts was not a factor in 1973 or 1974 financial difficulties. Delinquent accounts as a percentage of total services charged rose in 1971 to 2.19% from .81% in 1970, climbed substantially in *1972* after the Loomis acquisition to 6.33%, and then declined to levels below that of 1971, or 1.25%, in 1973 and 1.15% in 1974.[10] The Loomis acquisition took place in 1972, and while there was a significant increase in delinquencies in 1972, we find that account delinquencies cannot be considered to have caused the 1974 cash shortage.

39. While there was a substantial absolute increase in annual salary and wage expense of Pass Word after the

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operating costs, as reported in its financial statements was $393 in 1970; $5,623 in 1971; ($32,212) in 1972; $257 in 1973; ($7,991) in 1974; $22,983 in 1975; $35,052 in 1976 and $15,209 in 1977. (CCB, Items 1(a), 4(a)).

[10]

	1970	1971	1972	1973	1974
Services charged	$ 169,938	216,358	371,864	394,974	428,877
Cash receipts	168,568	211,620	348,310	390,028	423,954
Delinquency	$ 1,370	4,738	23,544	4,946	4,923

(CCB, Item 2 (b) and 4 (a)).

Loomis acquisition, it cannot be concluded that the labor costs of restaffing of the Loomis business by Pass Word played any part in the 1974 cash shortage of Pass Word. Operating statements show that the increase in salary and wage expense was commensurate with and slightly less than the increase in operating revenues between 1971 and 1974. (CCB Items 2(b) and 4(a)) Wages and salary expense rose 69% between year-end 1971 and year-end 1972, while revenues rose 65%. Wage and salary expense rose 73% between year-end 1971 and year-end 1973, while revenues rose 84%. Finally, wage and salary expense rose 88% between 1971 and 1974, while revenues rose 100%. While wage and salary expense did rise slightly in 1972 as a percent of revenues, it declined in 1973 and 1974 to levels below that in 1971, before the answering service acquisition.[11] Accordingly, we find that restaffing of the Loomis business by Pass Word did not contribute to Pass Word's financial difficulties.

40. A comparison of the revenues and telephone company service charges of Pass Word demonstrates that revenues increased significantly more than such expenses. Between 1971 and 1972, annual telephone company expenses increased 57% while annual revenues increased 65%. Between 1971 and 1973, those annual expenses increased 61% while annual revenues increased 84%. And between 1971 and 1974, annual telephone company expenses increased 69% while annual revenues increased

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[11]

	1971	1972	1973	1974
Wage and Salary Expense	101,126	171,195	174,739	190,281
Revenues	211,620	348,310	390,028	423,954
Wage and Salary as a % of Revenues	47.8%	49.2%	44.0%	44.9%

100%[12] Telephone company expenses *declined* as a percentage of revenue. Accordingly, we find that telephone company expenses did not contribute to the cash shortage of Pass Word in 1974.

41. While Bacon cites a "large initial down payment" for the 1972 acquisition as a factor contributing to Pass Word's financial difficulties (Statement, pp. 6–7), the amounts of the down payment and of the obligations created as a result of the acquisition were not supplied. However, Pass Word financial statements indicate that total long-term outstanding debt rose from $111,802 in 1971 to $370,477 in 1972, or an increase of $258,000. (Notes to 1971 and 1972 financial statements) Notes to the 1972 financial statement identified a purchase price of $227,300 for the business, plus equipment contracts associated with the business and assumed by Pass Word of $37,652, for a total of $264,932. The "Statement of Changes in Financial Position", (associated with the 1972 Financial Statement) shows a $5,000 option deposit applied to acquisition of the answering service business as a use of working capital, and $286,415 of new debt taken on as a source of working capital. (CCB, Item 2(b)) Accordingly, we find that very little of the 1972 acquisition was financed by cash, if any, but rather it appears to have been financed almost entirely by new debt.

42. Examination of Pass Word's operating and income statements indicate that the worsening income

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[12]Pass Word income statements show the following telephone company expenses. There are as a % of revenues:

1971	$ 29,051	13.7%
1972	45,478	13.1%
1973	46,711	12 %
1974	49,080	11.6%

(CCB, Items 2(b) and 4(a)) For revenues, see fn. 1, 11, supra.

statements of Pass Word after 1971 and through 1974 were caused by debt service arising from the 1972 acquisition of the Loomis answering service and by disproportionately growing depreciation and amortization charges. The following tables demonstrate the disproportionately growing debt service, depreciation, and amortizastion expenses:

Annual Interest Expense[13]

	1971	1972	1973	1974
Amount	5,470	21,694	26,824	26,846
% of revenues	2.6%	6.3%	6.9%	6.3%
% increase over 1971	–	297%	391%	391%
% revenue increase over 1971	–	65%	84%	100%

Annual Depreciation and Amortization Charges[13]

	1971	1972	1973	1974
Amount	15,350	58,252	61,270	64,896
% of revenues	7.3%	16.7%	15.7%	15.3%
% increase over 1971	–	280%	299%	323%
% revenue increase over 1971	–	65%	84%	100%

[13]Annual interest, depreciation and amortization expense, was taken from the Pass Word financial statement, as were the % of services charged. (Except for 1974, which was computed) (CCB, Items 2(b), 4(a)) The increase in revenues over 1971 was computed from revenue figures appearing at Fn. 10, supra.

Annual Debt Service Requirements[13a]

	1971	1972	1973	1974
Debt Payments due Dec. 31	19,340	22,437	75,197	65,632
% of revenues	9.3%	6.4%	19.3%	15.5%
% increase over 1971	–	16%	289%	239%
% revenues increased over 1971 revenues	–	65%	84%	100%
Outstanding long term debt (less current portion) at January 1	68,752	89,365	295,280	223,219
% increase over 1971	–	29.9%	329.5%	224.7%

43. However, Pass Word's *cash shortage* and financial difficulties between 1971 and 1974 were attributable to the mushrooming growth of debt service, caused by the 1972 acquisition of the Loomis answering service. Debt service growth dramatically outstripped the growth of revenues, and debt service was the *only* expense which required disproportionately large and increasing cash outlays after the acquisition. (Para. 36–42, supra) Although it is apparent that the significantly increasing depreciation and amortization charges played a role in Pass Word's

[13a] Debt payment due and outstanding long term debt are from "Notes" of Pass Word financial statements. (CCB, Items 2(b), 4(a)) % of services charged and % increase over 1971 was computed. The increase in revenues over 1971 was computed from revenue figures appearing at Fn. 10, 11, supra.

worsening *income statements* and lack of *taxable* income, the depreciation and amortization charges could not have caused any *cash* shortage because they occasioned no financial outlays. The Pass Word financial statements indicate no equipment replacements or retirements in 1973 and 1974 (CCB, Items 2(b), 4(a)), and Bacon does not offer equipment replacement as a cause for the cash shortage. Bacon claims that revenues from the acquired answering service were not as great as expected in 1972 because former employees of the Loomis business took some of the customers with them when they went to a new answering service. (Statement, pp. 6–7) The fact is that in 1972 annual revenues were 65% greater than in 1971. Bacon makes no complaint about Pass Word revenue performance in 1973 or 1974. Accordingly, and in light of the fact that Pass Word's 100% revenue growth between 1971 and 1974 outstripped growth of cash outlays, with the exception of debt service, we conclude that Pass Word's 1974 cash shortage and weak financial performance were due to the "enormous" debt load arising from Bacon's 1972 purchase of the former Loomis answering service. Bacon and Pass Word simply assumed greater financial obligations than they could carry.

44. Bacon does not allege in his "Statement" that Coeur d'Alene suffered a cash shortage in 1974. The financial data submitted by Coeur d'Alene indicates, to the contrary, that Coeur d'Alene suffered no losses and accumulated retained earnings since 1973. (Para. 35, supra) We find, accordingly, that Coeur d'Alene's late construction and operation of the 454 MHz channels was not occasioned by financial difficulties of Coeur d'Alene Answering Service.

45. We have no difficulty in finding that Pass Word's financial difficulties and cash shortage contributed to Pass

Word's late construction and operation of its 454 MHz frequencies. However, rather than excusing late construction and operation of those channels, Pass Word's financial difficulties raise a question whether Pass Word was financially qualified when it applied for the 454 MHz frequencies. Pass Word applied for the frequencies in mid and late 1972. Pass Word was suffering operating losses in 1972. It was during 1972 that Pass Word was experiencing what Bacon claims to have been high labor expenses due to restaffing the Loomis business, cash shortages due to a large downpayment for acquisition of that business, heavy debt service associated with the acquisition, increasing telephone company expense, increased customer delinquencies, and unexpected inadequate revenue performance. Yet during the midst of these alleged difficulties, which Bacon terms a "near financial disaster", he filed for three new channels on Pass Word's KMM 697 and three new channels for Coeur d'Alene. (Statement, pp. 6, 11) In light of the actual financial difficulties experienced by Pass Word during 1972, (Paras. 35—43, supra) it is questionable whether Pass Word could have been financially qualified for a grant of the 454 MHz frequencies.

Managerial and Other Duties of the Business in Early 1974

46. Bacon explains that the Pass Word cash shortage forced him to "do as much as possible by myself", making it difficult or impossible to attend to the construction of the 454 MHz channels in addition to regular managerial duties and tasks he ordinarily would have hired others to perform. The projects identified by Bacon were construction of the 35.58 MHz channel granted to Coeur d'Alene in December 1973, construction of the 152.06 MHz channel granted to Pass Word in October 1973, and develop-

ment of a computer accounts receivable system for Pass Word. (Statement, pp. 15–26, 34)

47. Activities which Bacon carried out in regard to construction of the 35.58 MHz channel were the ordering by telephone of a paging terminal in January 1974, the purchase in October 1973 of a metered cabinet, power amplifier and power supply, and the order in January 1974 of an antenna. Western Communications, a technical firm, modified the power amplifier. The entire facility was ready for installation by April 1974, but Bacon did not install the station then because of difficult access to Mica Peak and because control circuitry had not yet been installed for 35.58 MHz. (Statement, pp. 19–20) That circuit was installed in the summer of 1974. (Statement, pp. 36–37) Bacon does not indicate when the station equipment was installed or by whom. Bacon ordered the antennas, fittings, cable, and control station for the 152.06 MHz channel in October and November 1973. He ordered the base station and repeater for 152.06 MHz on some unidentified date, but states that Western Communications assembled the station by March 30, 1974. (Statement, pp. 15–18) Bacon does not say when the 152.06 station was installed or by whom. In view of Bacon's limited activity identified in connection with construction of the Coeur d'Alene 35.58 MHz and 152.06 MHz Pass Word channels, which consisted of ordering equipment only, we cannot find that the construction of the 35.58 MHz and 152.06 MHz channels were in any way responsible for Bacon's failure to construct the Pass Word 454 MHz facilities by June 1974 or the Coeur d'Alene 454 MHz facilities by September 1974, much less the 13 months to 24 months late construction of those channels.

48. Bacon explains that intensive work in developing an accounts receivable computer system for Pass Word

contributed to the delay in construction of the 454 MHz facilities of Pass Word and Coeur d'Alene. He explains that Pass Word's $8,000 net loss in 1974 was due to billing errors, and because of Pass Word's cash shortage, Bacon was required to develop the system himself. He thus learned the computer language and systems analysis necessary to do the job, working sometimes seven days a week and eighteen hours a day in February, March and April of 1974. (Bacon had had limited experience with computer programming, having learned FORTRAN some 11 years before.) His occasional assistance was necessary to those operating the system during May, but by the first week of June 1974, he had debugged the system and it functioned without attention from him. (Statement, pp. 24–26) Because Bacon was apparently fully occupied with Pass Word's computer billing system in February, March, and April, 1974, we find he was unable to personally attend to construction of the 454 MHz facilities of Pass Word and Coeur d'Alene.

49. Additionally, Bacon attributes some delay in construction of the 454 MHz facilities to his participation in a certification proceeding held by the Idaho Public Utilities Commission. Bacon was required to obtain a certificate of convenience and necessity for the Coeur d'Alene Answering Service. In December 1973, Bacon requested a Boise, Idaho attorney to prepare an application for the certificate, and spent some unspecified amount of time assisting in the preparation of the application, which was filed March 26, 1974. A hearing was held on July 9, 1974, in regard to the application. Again Bacon spent an unspecified amount of time in "several meetings" with another attorney in Coeur d'Alene, Idaho in June and July of 1974, to prepare for the hearing. (Statement, pp. 22–23, 34) We cannot find on the record herein that the

application and proceeding before the Idaho Public Utilities Commission contributed in any significant degree to the late construction of Pass Word's or Coeur d'Alene's 454 MHz frequencies. The time involved was not specified and was thus apparently *de minimis.*

Other Construction Delays

50. In mid and late 1972, Bacon applied for 454.025, 454.075 (UHF) and 152.06 MHz (VHF) for Pass Word, and for 454.125, 454,175 (UHF) and 35.58 MHz (paging) frequencies for Coeur d'Alene Answering Service. These applications were part of Bacon's plan to shift paging customers from the Pass Word 152.18 MHz frequency and to provide improved service to customers in Spokane (on Pass Word) and in Coeur d'Alene (on Coeur d'Alene Answering Service), because Bacon considered the 152.18 MHz channel of Pass Word to be crowded. (Statement, pp. 7–11)

51. Bacon's plan was to engage in "sequential construction" of the six frequencies–152.06 Mhz first, 35.58 Mhz second, then 454.025 Mhz (Pass Word), 454.175 (Coeur d'Alene), 454.075 Mhz (Pass Word), and 454.125 Mhz (Coeur d'Alene) in that order. Bacon states that the construction of 454.025, 454.075 and 454.125 Mhz were "dependent upon completion of the prior steps", which involved switching equipment used in frequencies constructed first to frequencies constructed later, and thus that his sequential plan was "reasonable." (Statement pp. 35, 12–14, 16–18, 40–41) Whether Bacon's plan for sequential construction was "reasonable" does not determine whether construction proceeded in a diligent fashion. We can resolve the issue of diligence of construction only by examining all of the circumstances surrounding applica-

tion for, grant of the CP's for, and construction of the 454 MHz channels.

52. The facts are that Bacon applied for the 454 MHz frequencies (along with the 152.06 and 35.58 MHz channels) in mid and late 1972. The CP's were granted in October 1973, December 1973, and January 1974. By their terms the 454 MHz CP's were to expire in June and September 1974. Bacon claims that he began planning equipment purchases and other activities in anticipation of eventual grants from the time of the applications, in mid and late 1972 (Statement, p. 11). However, the 454 MHz frequencies were not constructed until between October 1975 and April 1976.[14] Bacon claims that he did not realize how long it would take to complete construction and that he had no intention to delay, but that lack of money, technical difficulties, lack of equipment, and difficulties in obtaining control circuitry caused each step in his plan to "expand many times over." (Statement, pp. 35–49)

53. Wholly apart from the difficulties which Bacon relates, Bacon's intent deserves inspection. Two facts compel the conclusion that it was Bacon's intention well before the grant of the CP's that the sequential construction of the 454 MHz channels be stretched out through sometime in 1976 because of financial difficulties. First, Bacon repeatedly states that delays in construction of the 454 MHz facilities were attributable to a lack of money (which caused delays in obtaining necessary equipment, facilities, and assistance in construction) and that he "did not have an alternative to sequential construction, simply because I did not have the finances and staff to handle all of the construction at one time." (Statement, pp. 4–7, 19, 24–26,

[14]It is possible however, that 454.075 MHz was not actually constructed and operational until May 1976. See Para. 66, infra.

28–29, 31, 35–37) Second, Bacon provided a copy of his letter to General Telephone of the Northwest dated February 16, 1973, which outlines his plans:

> I would like you to find out what costs would be involved in General Telephone's furnishing, in approximately 9–12 months, *a* voice *path* from its facilities on Mica Peak, Idaho . . . for control of our existing radio facilities . . .
>
> Depending on costs, *up to six channels* may be needed for our own use *within three years,* so that costs for five additional channels should be considered.

(Statement, Exhibit 3. Emphasis added.)

54. Pass Word indeed was financially troubled, and the cause of these difficulties was the heavy debt burden imposed by Bacon in connection with his purchase of the Loomis business in 1972. (Para. 43, supra) The size, scope and duration of this burden was well known to Bacon in 1972, as were the financial difficulties which Pass Word suffered between 1972 and 1974. Bacon highlights the financial difficulties of Pass Word by citing an $8,000 loss in the first three quarters of 1974 and a $650 bank balance at the end of the third quarter of *1974,* and states that these difficulties resulted in "further construction deferred until the *following year.*" (Statement, pp. 36–37. Emphasis added.) In fact none of the 454 MHz channels of Pass Word or Coeur d'Alene saw any construction as of September 1974. (Para. 19, 28–30, supra) As early as February 1973, Bacon had decided, regardless of the expiration dates of any construction permits that might be granted and with full knowledge of Pass Word's financial obligations and situation, that construction would not be completed until sometime in 1976. Bacon's intention to

carry out his sequential construction of the six channels through 1976 (the four 454 MHz channels being last in the plan), his statement that sequential construction was financially required, and the fact that the 454 MHz facilities were completed between October 1975 and April 1976, require close examination of the reasons offered by Bacon for late construction of the 454 MHz facilities.

55. In his "Statement", Bacon repeatedly claims or implies that lack of cooperation and delays caused by General Telephone Company of the Northwest (GTNW) and Pacific Northwest Bell Telephone Company, in the provision of control circuitry, caused the late construction of the 454 MHz channels. In fact, control circuitry necessary for the operation of 454.025MHz was not *ordered* by Bacon before July 1975 from General or Pacific Northwest Bell or for 454.075 MHz until March 1976. Installation of 454.025 was completed on October 30, 1975, and of 454.075 on April 20, 1976. The Pass Word circuitry was not ordered until 13 and 21 months, respectively, after expiration of the CP for the 454 MHz frequencies. (Para. 18, supra) Control Circuitry for the Coeur d'Alene 454.125 and 454.175 MHz channels was ordered around March 5, 1976 and in June 1975. It was installed on October 1, 1976 and November 12, 1975, respectively. (Para. 28, supra). The Coeur d'Alene circuitry was not ordered until some 9 and 18 months after the construction permit expired. We examine the particular accusations and inferences of lack of cooperation by the telephone companies in Bacon's "Statement", as they are new or somewhat different than those made in pleadings and correspondence with this Commission.

56. Bacon complains that his February 16, 1973 letter, "describing our total requirements for control circuits" was only partially answered by GTNW, and that certain

questions were ignored. (Statement, pp. 13-15) Bacon's February 16, 1973 letter (Exhibit 3 to the Statement) asked only for the cost of one circuit for existing facilities, the cost for five additional channels for "different bandwiths", the effect upon charges to Bacon if other firms also obtained leased lines from the Mica Peak location, and any "additional information you may need from me". The July 3, 1973, letter of GTNW in response gave the cost for each control circuit Bacon might order and explicitly stated, "When you indicate to me your specific requirements regarding number of channels and the in-service date, we will process the necessary orders". The cost was the tariffed rate for such circuits. (Exhibit 4 to Statement) Bacon received responses to his questions. While Bacon complains that he "did not receive information regarding the method to be used or the in-service interval" until he received GTNW's letter of August 1, 1975 (Statement, p. 15), this cannot be considered a cause of late construction, since Bacon did not order control circuitry for 454.025 MHz until *July 1975*, or for 454.175 until *June 1975*. Circuitry for 454.125 MHz was not ordered until March *1976*, and for 454.075 MHz until March *1976*. (Para. 18, 28 supra)

57. Bacon states that but for the lack of control circuitry from the telephone company, he could have installed the Coeur d'Alene 35.58 MHz facility on Mica Peak at the end of April 1974, the station equipment having been ready for installation then. (35.58 MHz was the second of the six channels in Bacon's sequential plan.) Bacon, however, states that he did not *expect* that circuit to be installed until *June* 1974, having ordered the circuit by phone in January 1974. (Statement, pp. 20-22, 34-35) Bacon does not indicate what date the circuit was *promised*. Bacon complains that on the basis of experience with Pacific Northwest Bell and General Telephone, he

believed that the circuit should have been installed within two to five months after the order date, and that the telephone company had "more than ample time" to complete installation by June 1974. Bacon identifies the actual installation date, however, only by saying that the circuit was installed "in the summer" of 1974. (Statement, pp. 20-21, 36-37) Presumably, "summer" means either June, July or August. Bacon's hinting that construction was after June 1974, without identifying the actual installation date, does not persuade us that the 35.58 MHz circuit was installed after June 1974, after whatever the date of promised installation, or after Bacon expected. Nor can we find that construction of 35.58 MHz was delayed by lack of control circuitry or that construction of 35.58 MHz caused any delay in Bacon's plans for construction of the 454 channels of Pass Word or Coeur d'Alene.

58. Bacon attributes late construction of the 454 MHz facilities to General Telephone of the Northwest's failure to provide requested information and to an unreasonably long time for installation of control circuitry, especially in regard to the 454.025 MHz channel of Pass Word and the 454.125 MHz and 454.175 MHz channels of Coeur d'Alene. Bacon also cites incomplete installation of the 454.125 MHz circuit. (Para 59-64 infra).

59. Bacon complains that the telephone company failed to answer his January 1975 telephone call (requesting costs, dates of installation, and whether circuits could be four-wire to Mica Peak) and other similar calls thereafter until April 21, 1975, in a letter which only quoted rates. Bacon states he sent a letter on June 6, 1975, in another attempt to get that information. A few days later he called and told the telephone company:

> . . . to simply *go ahead with an actual order* to install the next two circuits, one from Spokane to

> be used for 454.025 MHz and one from Coeur d'Alene to be used for 454.175 MHz. In doing so, I accelerated the request in my June 6, 1975 letter, which called for the installation of additional circuits" sometime in the next few months . . ."

Bacon says he believed then that he had placed an order and "on that basis" wrote a letter on July 21, requesting that "the circuits" be installed by August 31, 1975. (Statement, pp. 38-39. Emphasis added.)

60. General Telephone's April 21, 1975, letter not only supplied the requested rates, but specifically asked Bacon to supply "any further particulars necessary to consummate your order." (Exhibit 11, Statement) Bacon's claim that he once again attempted to obtain the other information requested in January (installation time and whether circuits could be four-wire) by letter of June 6, 1975, and that he requested installation within a few months is not supported by examination of that letter. The letter explicitly stated that Bacon "*will be requesting a* radio control *circuit* from Coeur d'Alene to Mica Peak, Idaho sometime *in the next few months*", *not* that he was requesting *speedier installation of circuits already ordered* for installation within the next few months. The letter describes the serving arrangement desired, saying ". . . I'm quite interested in what you can come up with", and does not repeat an earlier request. (Exhibit 12, Statement. Emphasis added.) Bacon's explicit statement that a few days after June 6, 1975, he told General Telephone by phone to "go ahead with an *actual order* to install the next two circuits . . . for 454.025 and . . . for 454.175 MHz" confirms that he had not ordered any circuitry before or in the June 6, 1975 letter. (Statement, p. 39) Nor does Bacon's July 21, 1975 letter demonstrate that Bacon requested installation of the two circuits by August 29, 1975. That letter requests installation of "a radio control circuit" from Coeur

d'Alene to Mica peak, the 454.175 MHz channel, by August 29, 1975. (Statement, Exhibit 13) We find that in fact Bacon ordered the control circuitry for 454.025 MHz and 454.175 MHz after June 6, 1975, and by July 21, 1975. Circuitry for 454.025 MHz was installed by October 30, 1975, and for 454.175 MHz on November 12, 1975. (Para. 18, 28, supra), four or five months after the order, and was entirely reasonable in light of Bacon's prior expectations of two to five months. (Para. 57, supra) We cannot find that Bacon has demonstrated any lack of cooperation by General Telephone in supplying information, or that late construction was occasioned thereby.

61. Bacon states that he contacted Pacific Northwest Bell (PNWB) and orally placed an order for the 454.025 MHz control circuit from Spokane to Mica Peak, (because the control location was in PNWB's territory) and that shortly after July 8, 1975, he filled out a Bell form and returned it. By letter of August 1, 1975, General Telephone specified what Bacon terms a "highly unrealistic lead time" for installation – six months. Bacon claims to have refused to accept the projected installation date as reasonable, and believed that by "forceful and persistent" contact he could accelerate the installation date. By late September 1975, Bacon "held the view that the entire circuit installation would be accelerated, notwithstanding Mr. Perry's communications [the August 1, 1975 letter], and that all four circuits to Mica Peak would be in and operational by the beginning of December." (Statement, pp. 39, 42-43)

62. These claims are not supported by correspondence supplied by Bacon and are contradicted by other portions of Bacon's "Statement." General Telephone informed Bacon by letter of August 1, 1975, that facilities for the Spokane to Mica Peak control circuit, 454.025 MHz, re-

quired an installation period of 120 days because necessary equipment had a delivery interval of 120 days. (Exhibit 18, Statement) Pacific Northwest Bell Informed Bacon by letter dated August 19, 1975, that facilities would not be available until 120 days after acceptance of PNB's Termination Liability Agreement, and requested that Bacon contact PNB when he made his decision in the matter. (Exhibit 14, Statement) Despite Bacon's claimed unhappiness with a six month installation period, Bacon did not sign the termination agreement until October 12, 1975, two months later. Additionally, Bacon was informed on September 28, 1975, that until his accounts with PNB were put in a current status, PNB was instructing General Telephone not to proceed with construction of its portion of the 454.025 MHz control circuit. (Exhibit 14, Statement, "PBX Termination and Cancellation Liability Agreement" and letter of September 24, 1975). Whether or not Bacon was unhappy with the 120 day required installation period, his own actions caused or contributed to any delay in installation of the 454.025 MHz control circuit. Since the 454.025 MHz circuit was installed by October 30, 1975 (Para. 18, supra), when it was ordered between June and July 1975, and despite the fact that the termination liability agreement was not signed until October 12, 1975, we cannot find that either telephone company was tardy in providing that circuit within four or five months after the order date.

63. Bacon's claim that during August and September, he was continually assured that everything possible would be done to complete installation of the first two circuits expeditiously, and that at the end of September 1975 he believed the "entire circuit installation would be acclerated . . . and that all four circuits to Mica Peak would be in and operational by the beginning of December" (Statement, p. 43), implies that installation was *not* accelerated and

represents that he had been given assurances that the control circuits for the last two 454 MHz channels would be installed by December 1975. In fact, the 454.025 MHz control circuit installation was accelerated, having been completed within less than a month, instead of six months, after acceptance of the termination liability agreement. (Para. 62, supra) Bacon explicitly says in his "Statement" that his plan was to order the other two control circuits, for 454.075 MHz and 454.125 MHz, *after* the 454.025 and 454.175 MHz channels were activated and working properly, and that he ordered the 454.075 and 454.125 MHz control circuitry in March 1976. (Statement, pp. 41-42, 46) Accordingly, Bacon could not have been assured that the last two or the four 454 MHz channels control circuits would be installed by December 1975, and Bacon clearly had no such expectation or assurance.

64. Bacon ordered control circuitry for 454.075 and 454.125 MHz "on or before March 5, 1976." General Telephone advised on March 15, 1976, that one circuit could be installed within 30 days, and on April 20, 1976, the 454.075 MHz control circuit was installed. The other circuit was promised for July 19, 1976. (Statement, p. 46) Bacon requested an earlier installation date, but the circuit was installed by the telephone company in the last week of August 1976. (Statement, pp. 47-48) Bacon explains that because the circuit was installed without the E&M signalling he ordered, which he had been informed originally would be provided at no additional cost, but later was informed would cost substantially more, he was forced to order transmitter control units to avoid the E&M signalling requirement and thus was unable to complete that control ciruit until October 1, 1976. (Statement, pp. 47-49) We cannot find General Telephone to have been tardy in installing the 454.175 MHz control circuit. In light of Bacon's experience and expectation, a four or five month

installation interval was not unreasonable. (See Para. 57, 60, supra) Even if that circuit had been installed on the date of order in March 1976, the CP had already been expired for 18 months; whether it took one month or five to install the control circuit, the late construction of the 454.125 MHz channel cannot be attributed to the telephone company. While General Telephone did inform Bacon on May 27, 1976, that E&M signalling required no additional charge, Bacon was also informed that his inquiry "requires that the attached forms (M 546) be completed and returned." (Statement, Exhibit 29) Bacon says he had placed the order for E&M signalling by telephone, but was told in September that no record of the order existed. (Statement, pp. 47-49) Bacon does not claim to have sent back the forms, nor does he mention them. He does supply a completed Form M 546, dated July 8, *1975*, for a control circuit from Spokane to Mica Peak. (Exhibit 14, Statement) The 454.125 MHz control circuit, however, runs between Coeur d'Alene and Mica Peak. Accordingly, we find that if Bacon did order the E&M signalling, the failure of General Telephone to supply it caused an approximate one month delay, from the end of August 1976 when General Telephone installed the circuit to October 1, 1976, when Bacon installed control signalling equipment. That delay does not excuse the total 24 month late construction of the 454.125 MHz channel.

65. Bacon made several changes in his construction plans for the 454 Mhz channels as he went along. First, in June 1974, when the CP for 454.025 Mhz and 454.075 Mhz expired, he decided to construct the 454 Mhz facilities at his own site on Mica Peak instead of at an adjacent site owned by Western Communications and then transfering the channels in 1975 to his own site (as had been originally planned). Second, Bacon decided in June *1975* that it would be better to purchase new stations for the 454.025

Mhz, 454.075 Mhz and 454.125 Mhz frequencies, rather than to switch over control and repeater stations from other frequencies and disrupt service on those other frequencies. Third, Bacon decided in March 1976 that a receiver multicoupler would be better than the duplexers originaly planned for the 454 MHz frequencies. (Statement, pp. 34, 40-41, 47)

66. Bacon completed the new site on Mica Peak in August 1974, but states that control circuits were "still troublesome". (Statement, p. 34) Since he had not ordered any control circuits for the 454 Mhz channels by August 1974, we are unable to find that construction of the new site on Mica Peak had anything to do with the late construction. Whether Bacon switched over equipment from other channels, or obtained new equipment for the 454 Mhz channels, it was necessary to have equipment for both the 454 Mhz and the other channels. Bacon says nothing about having obtained replacement equipment for the other channels; he did not order base stations for three of the 454 Mhz channels until June 1975, nor the station antennas for all four 454 Mhz channels until July 1975. The base station for 454.175 MHz had been ordered in November 1973. (Para. 19, 29, supra) We cannot find that the changed plans for the type of station equipment either caused or shortened any delay in construction nor do we judge the merits of one plan over another. What is relevant is that necessary equipment was not even ordered until long after expiration of the construction permits. Bacon's decision in March 1976 to use a multicoupler rather than duplexers for the 454 MHz frequencies caused further delay. Bacon installed four antennas for the 454 MHz frequencies in October 1975, and had otherwise constructed only the 454.025 MHz and 454.175 MHz channels in October and November 1975. (Para. 18, 19, 28-30, supra. Statement, p. 42, Exhibit 27) Since both a receive

and transmit antenna is generally necessary for each channel, it is apparent that Bacon had to obtain a multicoupler or duplexers to permit transmit and receive functions for the four channels to be performed on the four antennas. The multicoupler was received in April and installed in May 1976. (Statement, p. 47) Whether Bacon used a multicoupler or duplexers, the issue is diligence in obtaining and installing the equipment. Bacon simply had not made an effort to obtain necessary equipment for this function until March 1976.

67. Bacon outlines in detail "technical problems" with the 454 Mhz channel equipment which started on October 30, 1975 when 454.025 Mhz "went on the air." (Statement, pp. 49-57) Each difficulty arose after construction was completed and affected service quality, or arose during construction when it was corrected. Bacon does not allege that construction was delayed thereby, and the particulars given do not create any inferences to that effect.

68. Bacon also attributes late construction of the four 454 Mhz channels to disruption of his planned construction of 35.58 Mhz and 152.06 Mhz channels. (Statement, pp. 17-18, 20) Those two channels preceded the 454 Mhz channels in Bacon's sequential construction program.[15] Bacon states that he had the station equipment for 35.58

[15]Bacon claims to have originally planned to use the repeater in control of 152.18 MHz as one of the base stations for 454.025 MHz or 454.075 MHz when control circuits were provided (presumably for 152.18); to put 152.06 Mhz on the air using the 454.250 Mhz and 459.250 Mhz stations as control and repeater, and then when phone circuits were installed to use these stations as 454.025 and 454.075 MHz base stations; and to use existing 459.300 MHz repeater facilities as the base station for 454.125 Mhz. (Statement, pp. 14, 16, 40).

Mhz ready for installation in April 1974, and but for the "lack" of control circuitry could have completed construction then. However, installation of the 35.58 Mhz control circuit did not delay construction of that channel. (Para. 57, supra) Bacon cites as disruptive of his plan to construct 152.06 Mhz in January 1974, first, the difficult winter weather made Mica Peak impassable (the reliable building season being June through September) and second, a three week delay in delivery of a base station scheduled for delivery the 10th week of 1974 (or approximately mid-March). The station arrived well in advance of the June 1974 expiration date of the CP for 152.06 Mhz, 454.025 Mhz and 454.075 Mhz. Since Bacon did not identify the construction date of the 152.06 Mhz channel, we cannot find that a three week delay in delivery of the base station disrupted his planned construction of 152.06 Mhz, or that construction of 152.06 Mhz was disrupted at all by this late delivery. In any case, a three week delay is *de minimis* in explaining the extremely late construction of the 454 Mhz channels.

69. Bacon also cites as a factor in the late construction of the 454 Mhz channels the hospitalization of his father, Jennings Bacon, in March 1974. Jennings Bacon had suffered a severe stroke at the age of 72, in 1970. In March 1974, he was hospitalized three days for a hemorrhaging ulcer. Bacon states that he was not responsible for his father's care but that he attempted to visit his parents as much as possible. (Statement, pp. 5, 23-24) We find that family illness during March 1974, was not responsible for the 13 to 24 months late construction of the 454 MHz channels. Bacon does not provide any details regarding the length of this illness to substantiate such a claim.

Late Construction Due to Foreseeable Circumstances Within Control of Respondents

70. Bacon claims that while the facts show a lack of "diligence" in construction and operation of the 454 MHz channels, he was "totally conscientious in constructing and operating the 450 MHz systems on as rigid a timetable as my own capabilities and outside circumstances beyond my control permitted." (Statement, p. 59) The Commission has consistently held that where construction is postponed by a permittee because of matters within its independent business judgment, and not to unforeseeable circumstances beyond the permittee's control, postponement of construction must be considered within the permittee's control. Where economic considerations could have been, should have been, or were apparent to the permittee, we cannot find that unforeseeable conditions have postponed construction. Nor is postponement to concentrate efforts on the operation of existing facilities anything but a voluntary decision within the control of the pemittee. *Northeast TV Cablevision Co.*, 21 FCC 2d 442 (1970). *Nelson Broadcasting Co.*, 18 FCC 2d 609 (1969). *Bay Video, Inc.*, 25 FCC 2d 167 (Rev. Bd. 1970)

71. The claimed heavy managerial and other duties associated with Pass Word and Coeur d'Alene prevented Bacon from *personally* attending to construction of the 454 MHz channels for three months in 1974 after grant of the CP's. (Para. 46-49, supra) This does not explain the 13 to 24 month late construction of the four channels. In any case, Bacon's decision to attend to the operation of existing facilities rather than construction of the 454 MHz channels was a voluntary business judgment. Bacon's decision to personally participate in construction of the 454 MHz channels rather than to obtain adequate assistance was likewise a matter within his independent

business judgment. By June 1, and July 1974 he was able to devote himself wholly to construction of the 454 MHz channels. (Statement, pp. 32, 34), but claims that "outside circumstances beyond my control" delayed completion of construction. (Statement, p. 59) Specifically, Bacon has claimed before and after designation of this proceeding, including extensively in his "Statement", that lack of cooperation and delays by General Telephone Company of the Northwest and Pacific Northwest Bell in provision of control circuitry were continuing problems. The facts demonstrate, however, that the telephone companies installed the circuitry within the period Bacon admittedly considered was reasonable, and that Bacon simply did not bother to order circuitry until June 1975 for 454.175 MHz, July 1975 for 454.025 MHz, and March 1976 for 454.075 and 454.125 MHz. (Paras. 55–64, 18, 28, 68, supra) The "technical" problems Bacon alleges were not a factor in late construction. (Para. 67, supra) Bacon's decision in June 1974 to construct at a different site, and his decisions to use equipment different than originally planned were matters entirely within his control and not imposed upon him by unexpected circumstances (Paras. 65, 66, supra). Bacon merely changed his mind. The claimed "disruption" of his plans for sequential construction due to alleged difficulties with the first two channels was *de minimis,* cannot explain the 13 to 24 month late construction, and was not entirely beyond his control. (Para. 68, supra) Bacon engaged in seriatim construction, rather than simultaneous construction, because of financial necessity. Postponement of construction because of foreseeable or foreseen economic conditions is a matter entirely within the control of the permittee. The financial difficulties of Pass Word were entirely and solely due to the heavy debt load taken on in 1972 by Bacon in connection with Pass Word's expansion. Not only should Bacon

have foreseen the financial difficulties that Pass Word would suffer in 1974, he in fact did foresee them, as evidenced by his 1973 plan to engage in sequential construction through 1976, and Bacon's statement that sequential construction was a financial necessity. (Paras. 53, 54, supra)

72. Bacon claims that because of his youthful haste and his inexperience in the radio common carrier business, he failed to comprehend the size and cost of the task of constructing the 454 MHz facilities in relation to his limited financial and "personal" resources. Bacon claims that as a result each stage of his sequential construction program encountered unexpected difficulties and took much longer than expected. (Statement, pp. 30—35)

73. In June 1974 Bacon was 28 years old, had managed Pass Word for four years, and Coeur d'Alene for at least two years. Bacon is a college graduate and completed one year in the University of Pennsylvania Master of Business Administration program.

74. Whether Bacon failed to appreciate the inability of Pass Word and Coeur d'Alene to construct the 454 MHz facilities in a timely fashion is not the issue. The issue is whether the late construction was due to *foreseeable* circumstances, not *unforeseen* circumstances. Since Bacon has repeatedly stated that late construction was due to economic considerations, and since in fact late construction was attributable to economic conditions within Bacon's knowledge and of his own making and was not attributable to any other circumstances, we must conclude that the late construction was due to foreseeable circumstances within Bacon's control.

75. Even if Bacon's reliance upon his relative youth and short experience in the radio common carrier business

could be considered an excuse as a matter of law, in fact they played no role in the late construction of the 454 MHz channels. To accept Bacon's contentions, we would have to conclude that Bacon failed to ascertain the costs of constructing the channels, and Pass Word's and Coeur d'Alene's financial positions, before representing to the Commission in their applications that they were financially qualified to construct the 454 MHz facilities. We also would have to conclude that Bacon failed to ascertain the technical aspects of construction before representing in their applications that Pass Word and Coeur d'Alene were technically qualified to construct the 454 MHz channels, or that Bacon was unaware that such work could be contracted out.

76. Since applications in the Domestic Public Land Mobile services require, and since Bacon supplied, the identity and cost of each major piece of station equipment in the Pass Word and Coeur d'Alene 454 MHz applications, and since Bacon knew as early as July 1973 the cost of control circuitry (Para. 56, supra) we cannot find that Bacon was unaware of the significant costs involved. Bacon himself negotiated the Loomis acquisition, and was aware of the size of the debt obligations taken on to finance the acquisition. We cannot find that Bacon could have been ignorant of Pass Word's financial position or that he could have failed to comprehend that the financial difficulties would not be short-lived.The only source of significant financial difficulty for Pass Word was its enormous debt burden. (Para. 33—43, supra) Bacon's 1973 plan to compl construction in 1976 and his admission that sequential construction was a financial necessity confirm that Bacon was well aware of his financial resources.

77. Since Bacon had been managing two RCC businesses for several years before 1974, and in view of Bacon's admitted use of technical assistance in 1974 in

constructing the 152.06 and 35.58 MHz stations (Statement, pp. 18, 20), we cannot conclude that Bacon was unaware that technical assistance could be obtained in constructing the 454 MHz facilities. Bacon explicitly stated he used technical assistance in constructing the 454 MHz channels. (Statement, pp. 36, 39, 40, 42, 46-47, 49) Bacon never states or implies that he attempted to accomplish the construction single-handedly, or that he brought in technical assistance only when difficulties arose. There were no unforeseeable circumstances which delayed construction, and since Bacon never states when he planned to finish construction of the 454 MHz channels, we are not persuaded that unexpected difficulties caused construction to take longer than Bacon expected. Bacon's claim that he failed to appreciate the magnitude of the task of constructing the 454 MHz channels, in relation to his financial and other resources, is simply not persuasive.

78. Bacon claims that in his youthful haste and impatience to operate the 454 MHz channels, he allowed his "aspirations to outrun my capabilties", and that he "should have developed an orderly and realistically achievable plan for the construction and inauguration of the six channels." The fact is that Bacon did have a plan for the construction of the 454 MHz channels. That plan was formulated in 1973 before grant of the construction permits, and was to complete construction sometime in 1976. The sequential construction program was necessitated by economic considerations. The fact is that Bacon completed construction of the 454 MHz channels between 1975 and 1976. (Para. 18–20, 28–30, 53, supra) Rather than corroborate his claim that he failed to appreciate the costs or difficulties of construction, the facts demonstrate that Bacon developed an achievable plan for construction and successfully carried it out. That plan,

however, contemplated completion of construction years after expiration of the construction permits.

79. Bacon protests that he had no "intent to delay construction", that unnecessary delay in the face of pressing demand is alien to his concept of conducting business, and that it would be contradictory to spend time and energy and money to construct facilities without putting the frequencies into service "as soon as practicable." (Statement, pp. 59, 30) Whether or not Bacon had a motive in constructing the 454 MHz channels through 1976 is not our primary concern. Our concern is that the late construction was a matter within Bacon's control and was a result of foreseeable circumstances. However, we cannot let go unchallenged Bacon's assertions of innocent intentions.

80. Bacon infers that there was pressing demand and that, therefore, he had no motive to delay. Among information obtained from Bacon by the Bureau after certification of the record was the number of customers and units on each of Pass Word's and Coeur d'Alene's channels between 1970 and 1977:

Rodney J. Bacon, D/B/A
Coeur D'Alene Answering Service

Year	KUO 646		KWU 337			
	35.58		454.125		454.175	
	C**	U***	C	U	C	U
1973	—	—	—	—	—	—
1974	*	*	—	—	—	—
1975	*	*	0	0	0	0
1976	69	79	0	0	3	3
1977	74	84	21	24	7	7

* Figures not available.
** Customers.
*** Units.

Pass Word, Inc.
Customers & Units In Service

	KMM697								KOA271				KRS678		KUC918	
Year	152.06		152.18		454.025		454.075		152.03		152.21		158.700		35.22	
	C	U	C	U	C	U	C	U	C	U	C	U	C	U	C	U
1970	–	–	96	104	–	–	–	–	–	–	–	–	–	–	–	–
1971	–	–	171	266	–	–	–	–	–	–	–	–	–	–	–	–
1972	–	–	55	75	–	–	–	–	22	25	*	*	–	–	–	–
1973	–	–	77	135	–	–	–	–	59	94	*	*	–	–	–	–
1974	*	*	80	120	–	–	–	–	63	103	*	*	–	–	–	–
1975	*	*	86	122	*	*	–	–	60	91	*	*	250	492	–	–
1976	*	*	125	165	*	*	*	*	59	96	*	*	300	589	90	102
1977**	35	51	108	141	10	10	10	10	60	95	30	65	338	771	110	124

* Separate figures not available

** There may be some double counting in the figures for customers in 1977

– Not licensed to Pass Word, Inc. during year indicated

*** Customers

**** Units

81. The figures indicate that 223 units were being served on the 152.18 and 152.03 MHz channels of Pass Word in 1974, that in 1975 the 158.700 MHz channel and in 1976 the 35.22 MHz channel began serving customers, and that after 454.025 and 454.075 MHz were finally constructed, only 10 units were served on each channel in *1977*. The facts demonstrate not pressing demand, but that three years after expiration of the CP's for 454.025 and 454.075 MHz, KMM 697's four channels were not fully occupied. After Coeur d'Alene's 454.125 and 454.175 MHz channels were finally constructed, they served only three units combined in 1976, and 28 in 1977. The actual loading of Pass Word's and Coeur d'Alene's channels, before and after con-

struction of the 454 MHz channels, indicate that there was no pressing demand.

82. Bacon's assertion that it would have been contradictory to have expended time, energy and effort to construct, and then not to put the channels into service as soon as practicable, does not establish good intentions. In fact, it appears from the usage figures supplied by Bacon that service was not provided until some time after construction took place. (Paras. 18—20, 28—30, supra) Bacon's own statements establish that his intent was to construct when financially feasible. (Statement, pp. 19, 31, 35—36, 37. Para. 53—54, 76, supra) Bacon's inference that he constructed as soon as "practicable" does not establish, much less allege, that he attempted to construct within the construction period of the permits.

83. Bacon nowhere states that his intent was to construct during the construction period. His intent was to proceed at an unhurried pace through 1976, evidenced by his casual pace in ordering necessary station equipment and control circuitry, his 1973 plan to finish construction in 1976, and additionally by his curious indifference to the allegedly short building season upon Mica Peak. Bacon cites as a difficulty in construction of the 454 MHz channels the short building season on Mica Peak, occasioned by difficult weather and access. (Statement, pp. 17, 37, 39) Bacon was aware of this factor as early as 1971. Pass Word installed facilities for 152.18 MHz on Mica Peak in February 1971 with great difficulty and had winter maintenance difficulties in the following two years (Statement, pp. 11-12). Nonetheless Bacon states he originally planned to construct 152.06 MHz in January 1974, despite the difficulties involved. (Statement, p. 17) Bacon states that in September 1974 he decided to defer construction of the 454 MHz facilities until 1975 because, among other

things, the reliable building season ends in September. (Statement, p. 37) However, Bacon did not begin ordering equipment for any of the 454 MHz facilities until June 1975 and ordered one control circuit in June 1975 and another in July 1975. Since Bacon expected a two to five month interval for installation of control circuitry (Para. 57, supra), he clearly took a knowing chance that the facilities and station equipment would not be available before September 1975 and the end of the building season, when the CP's had already been expired for a year. We must conclude that either there was no significant difficulty in constructing on Mica Peak outside of June through September, and thus that Bacon's September 1974 decision to defer construction was not prompted by that circumstance, or that Bacon's indifference to the short building season is more evidence of his casual attitude toward construction of the 454 MHz channels. Bacon cites several examples of his getting to Mica Peak to construct facilities outside the building season or in difficult conditions to show his diligence (Statement, pp. 40, 46-47) If anything, this demonstrates that if Bacon considered it desirable or necessary to get there, the difficulties were not insuperable.

84. There is no evidence that construction of the 454 MHz facilities was delayed by unforeseeable circumstances outside Bacon's control or that there were in fact any circumstances that caused delay, beyond financial difficulties for which Bacon was responsible. There is substantial evidence that the late construction was planned and deliberate. We conclude that late construction of the channels was deliberate and not caused by circumstances outside Bacon's control.

Misrepresentations Made to the Commission in Applications, Pleadings and Correspondence

85. Pass Word's application to cover construction, Form 403, dated June 4, 1974, stated that the construction of 454.025 MHz and 454.075 MHz was completed June 4, 1974, and that those channels of Station KMM 697 were ready for operation. In fact, the base station equipment installation for 454.025 was not completed before October 30, 1975, and for 454.075 MHz not before April 20, 1976. (Para. 19, supra) Necessary control circuitry was not installed until October 30, 1975 for the 454.025 MHz channel, and April 20, 1976 for the 454.075 MHz channel. (Para, 18, supra) Rodney Bacon entered the date for completion of construction and signed the certification section. (Para. 11, supra) That someone else had checked the box "yes" next to Section 3(d), "is the station now ready for operation?", for Pass Word does not relieve Bacon of the responsibility for the misrepresentation. Bacon certified the Form 403. The certification section avers:

> I certify that the statements in this application are true, complete and correct to the best of my knowledge and belief, and are made in good faith.

Accordingly, we find that Bacon misrepresented to the Commission in Pass Word's application for a license to cover construction that the 454 MHz facilities were constructed and ready for operation on June 4, 1974.

86. Bacon submitted a service and equipment test notification, by letter dated June 5, 1974, that tests would commence on Pass Word's 454.025 MHz and 454.075 MHz channels on June 6 and 7, 1974, respectively. No installation of base equipment has taken place at all, nor had equipment and control circuitry been ordered. (Para. 18,

19, supra) To conduct service and equipment tests on the dates noticed or anytime soon thereafter would have been impossible. In fact tests were not conducted. (Para. 21. supra) Accordingly, we find that Bacon misrepresented the state of construction and that Pass Word would commence service and equipment tests upon the dates noticed in the June 1974 letter.

87. In Pass Word's October 6, 1975, amendment to its July 1975 application for two additional channels on KMM 697, Pass Word stated as grounds for waiver of the required loading study, that the 454 MHz channels had been constructed but that "inordinate delays" by General Telephone and Bell Telephone in providing control circuitry prevented operation of the channels. Pass Word also represented that control circuits for the 454.025 and 454.075 MHz channels were promised by late 1975. Control circuitry for the 454.025 MHz channel was installed on October 30, 1975, a reasonable interval after ordering. (See Para. 18, supra) Bacon's October 6, 1975 statement that the circuitry for both channels had been promised by the telephone companies for late 1975 is a misrepresentation, since he did not order circuitry for the 454.075 MHz channel until March 1976. There were in fact no inordinate delays by the phone companies in provision of the 454.025 MHz or 454.075 MHz control circuits. (Para. 18, 55-63, supra) We find that the October 6, 1975 amendment of Pass Word misrepresented the date of construction of the Pass Word 454 MHz channels, and misrepresented that the telephone companies were responsible for late construction and operation of those channels, when in fact the late construction and operation were matters within Bacon's control. (Para. 71, supra)

88. By letter dated November 19, 1975, in regard to its application for two additional channels on KMM 697, Pass Word requested a 120 day extension to comply with the requirement of a traffic load showing for the 454 MHz channels. That letter stated that the "two channels . . . were activated earlier this month . . ." and attributed the request for extension to delays in the delivery of mobile units. In fact, Bacon did not begin to order mobile transceivers for Pass Word's 454 MHz channels until November and December 1975. (Statement, p. 44) Additionally, the 454.075 MHz base station equipment and control circuit were not installed or activated before April 20, 1976. (Para. 18, 19, supra) Accordingly, we find that the November 19, 1975, letter misrepresented that the 454.075 MHz channel was constructed and ready for operation in November 1975, the reasons for failing to have submitted a loading study in a timely manner, and that delays in delivery of mobile units required a 120 day extension for submission of the loading studies.

89. In Bacon's sworn affidavit, appended to Pass Word's March 1976 "Opposition to Courtesy's 'Petition to Institute Investigation' ", Bacon stated that subsequent to June 7, 1974, he had "numerous contacts" with General Telephone in order to obtain the necessary control circuitry but "was unable to obtain satisfaction for more than a year." (Para. 14, supra) Especially since Bacon did not order control circuitry for the Pass Word channels until July 1975 and March 1976 (Para. 18, 55-63, 71, supra), we find that Bacon misrepresented that General Telephone failed to give satisfaction.

90. Bacon's sworn affidavit also stated that when he completed Pass Word's Form 403 and service and equipment test notification in June 1974, he was "fully expecting that lines [control circuitry] would be connected and

the three stations ready in all respects to begin operation on all three channels by the service test commencement date." (Para. 14, supra) Bacon also swore that the base stations and antennas were accessible to him and that in a quick "dash to the site" he could have installed the equipment in an afternoon. Bacon also swore to having believed that connecting the control circuitry was a "formality" which could be accomplished within 24-48 hours. Bacon stated he understood such facts sufficient to constitute completion of construction. Since the control circuits for the Pass Word 454 MHz channels, the base station equipment, and the antennas, had not all been ordered by June 1974 (Para. 18, 19, supra) we find that Bacon's sworn affidavit misrepresented that construction could have been completed or that he believed construction could have beem completed in June 1974, much less in an afternoon. We also find that Bacon misrepresented that he understood construction to have been completed under the terms of the CP on June 4, 1974. Finally, we find that Bacon misrepresented that he believed on June 1974 that installation of control circuitry was a mere formality that could be completed in 24-48 hours, or that it could have been done by the dates noticed for service and equipment tests, since he did not order control circuitry for another 12 and 21 months after June 1974. (Para. 18, supra)

91. Pass Word's March 1976 "Opposition" stated that Pass Word's two 454 MHz channels had been activated in November 1975, (in response to Courtesy's "Petition" which had alleged late construction and operation of Pass Word's 454 MHz channels), thus repeating the misrepresentation of the November 10, 1975 letter. By letter dated April 5, 1976, Bacon notified the Mobile Services Division that Pass Word's March 1976 "Opposition" was "not accurate." Bacon stated that the 454.075 MHz chan-

nel couldn't be activated because of a "continued inability to acquire a landline circuit." Since Bacon did not order the 454.075 MHz circuit until March 1976, and since base station equipment was not installed before April 20, 1976, we find that Bacon misrepresented the delay in construction and operation of the 454.075 MHz channel as attributable to General Telephone Company, in a further attempt to conceal his responsibility for late construction, and did not correct the station files.

92. Coeur d'Alene's application to cover construction, Form 403, dated June 6, 1974, stated that construction of the 454.125 and 454. 175 MHz channels was completed on June 4, 1974, and that these channels of KWU 337 were ready for operation. In fact, the base station equipment installation for 454.125 was not completed before October 1, 1976, and for 454. 175 not before October 30, 1975 (Para 29, supra). Necessary control circuitry was not installed for 454.125 until October 1, 1976, and for 454.175 until November 12, 1975. (Para. 28, supra). Rodney Bacon entered June 4, 1974, as the date for completion of construction and signed the certification section. Bacon is responsible for the truth and accuracy of Coeur d'Alene's Form 403. We find that Bacon misrepresented to the Commission that construction of the 454.125 and 454.175 MHz channels had been completed and that the channels were ready for operation on June 4, 1974.

93. Bacon submitted a service and equipment test notification by letter, dated June 5, 1974, that tests would commence on Coeur d'Alene's 454.125 MHz and 454.175 MHz channels on June 10, 1974. No installation of the base station equipment had yet taken place, the equipment had not been ordered, nor had the necessary control circuitry been ordered. (Para. 28, 29, supra) It would have been impossible to have conducted service and equipment

tests on the days noticed, or any time soon thereafter. In fact, tests were not conducted. (Para. 31, supra) Accordingly, we find that Bacon misrepresented that construction was completed and that Coeur d'Alene would commence service and equipment tests upon the dated noticed.

94. Coeur d'Alene filed, with its June 1975 application for an additional channel on Station KWU 337, a traffic load study showing 12 mobile units served by the 454.125 MHz channel and 13 mobile units served by the 454.175 MHz channel between June 9, 1975 and June 15, 1975. Attached to that application was another document labelled "Description" of "Units In Service" showing 25 units on the 454.125 MHz and 454. 175 MHz channels. In fact, the 454.125 MHz channel was not constructed before October 1, 1976 and the 454.175 MHz channel was not constructed before November 12, 1975. (Para. 30, supra) Accordingly, we find that the traffic load studies associated with Coeur d'Alene's application misrepresented that those two channels were operational serving 25 units in June 1975.

95. An amendment to Coeur d'Alene's application for an additional channel on KWU 337, filed October 28, 1975, and signed by Rodney Bacon, stated that Coeur d'Alene could not fill its 49 held orders on 454.125 and 454.175 MHz because there was only one control circuit between Mica Peak and the control point, that for the past year Bacon had been attempting to obtain additional control circuits from General Telephone Company, and that Bacon had "firm assurances from General that installation would be completed on or before Thursday, October 20, 1975." As a result of this explanation, Bacon was given an additional three months to justify his applications for an additional channel on KWU 337. Bacon's October 28, 1975, amendment implies that control circuitry for one of the channels was *in place* and that the second had been

promised as of eight days before Bacon's letter was filed, but was not yet installed. In fact, as of the date of Bacon's letter, *only one circuit,* for the 454.175 MHz channel, had been *ordered.* It was installed November 12, 1975. (Para. 28, supra) The control circuit for the 454.125 MHz channel was not even ordered until March 1976. As of the date of Bacon's letter, October 28, 1975, *no* circuitry for the 454 MHz channels of either Pass Word or Coeur d'Alene had been *installed.* (Para. 18, 28, supra) The one installed circuit had to have been associated with facilities other than the 454 MHz channels. Bacon's statement that completion of control circuit installation for the *two* Coeur d'Alene 454 MHz channels was promised for no later than October 20, 1975, is false because Bacon did not order control circuitry for the 454.125 MHz channel until March 1976. Finally, Bacon's statement that in October 1975 he had been attempting for a year to obtain control circuitry from General Telephone is not true. Bacon ordered the 454.175 MHz control circuit in June 1975 and the 454.125 MHz control circuit in March 1976. Late construction was a result of Bacon's independent business judgment. (Para. 70-84, supra) Accordingly, we find that Bacon's October 28, 1975 letter misrepresented the state of construction of the Coeur d'Alene 454 MHz channels, Bacon's diligence in completing construction, and that the telephone company was responsible for the delay in construction and operation of those facilities.

96. On April 1, 1976, Bacon filed a further amendment to his application for an additional channel on KWU 337. Bacon stated therein that he was awaiting installation of control circuitry for 454.125 MHz and that every effort to secure such had been made. On April 13, 1976, Bacon filed another amendment in which he stated that the 454.125 and 454.175 MHz channels were not in operation at the time of Coeur d'Alene's July 1975 application and

load study because of the lack of control circuitry. We find that Bacon's statements that he had made every effort to obtain control circuitry were misrepresentations, in light of Bacon's failure to order the circuits until June 1975 and March 1976, when the CP for those channels expired in September 1974. (Para. 28, 55-60, 63-64, supra) Likewise, Bacon's claims that the lack of control circuitry was responsible for late construction and operation of the 454.125 MHz channel, and beyond his control, were misrepresentations. The late construction was a matter entirely within Bacon's control and in fact the telephone companies completed installation reasonably soon after orders for circuits were placed. (Para. 70-84, supra.)

Whether Misrepresentations Were International or Deliberate

97. Bacon contends in his "Statement" that his "explanation establishes that I did not make willful or knowing misrepresentations" in the Forms 403 or the service and equipment test notifications filed in June 1974, and that he made no deliberate or intentional misrepresentations in pleadings and correspondence with the Commission. (Statement, pp. 26-34, 60-69)

98. Bacon attributed any misstatements of fact in the Forms 403 and the test notifications to his state of mind in "the first week of June 1974", which he described as "extremely pressured, harassed, financially worried and distracted by the numerous projects and routine responsibilities" of Pass Word and Coeur d'Alene. Bacon alleges that any misrepresentations were a result of this "crisis" period and of his understanding of Commission rules, requirements, and the purposes of the Forms 403 and test notification. Bacon states that in June 1974 he believed that what "remained to be done was minute in

comparison" with what had already been done, that he was "anxious to get on the air", that "lengthy delay was unthinkable" because there was pressing demand, and that in order to prevent delay, he submitted the Forms 403 and the test notifications. Bacon states that he did not "focus on . . .nor . . . formulate any understanding of, the terms in Items 3(c) and 3(d) of Form 403".

99. Even if it were possible to find that Bacon was "extremely pressured, harassed, financially worried and distracted" by the management of Pass Word and Coeur d'Alene in the first week of June 1974, it would not be possible to find that he was thereby rendered unable to discern the truth or falsity of his representations in the forms 403 and the test notifications that the four 454 MHz channels were constructed and that tests would commence in June 1974. No amount of "pressure" in June 1974 could conceivably have erased from Bacon's mind the knowledge that construction had not yet *begun* and essential equipment and facilities had not even been *ordered* for the 454 MHz channels. (Paras. 18-20, 28-30, supra) Additionally, Bacon identified no circumstances which constituted a "crisis" in June 1974, financial or otherwise. While Bacon was financially pressed, this was not a new, unique, or aggravated circumstance, nor does Bacon provide any information to so indicate. Bacon was no more financially pressed in June 1974 than formerly. This had been the state of affairs for several years and was the result of Bacon's own actions. (Para. 35-45, supra) Nor was Bacon's "state of mind" in the first week of June 1974 clouded by the prospect of too much to do in too little time. The "numerous" duties Bacon identified, normal to the management of an RCC or any small business, prompted extraordinary efforts by Bacon only between February and April 1974, not in June or afterwards.

(Para. 46, 49, supra) Also, Bacon admits that he was able to devote his *full* attention to the 454 MHz facilities by June 1 and July 1974. (Statement, pp. 32, 34) No "crisis" existed in the first week of June 1974. Instead, Bacon deliberately planned to delay construction through 1976 (Para. 53-54, supra) and knew in June 1974 that construction was nowhere near being complete. Bacon's misrepresentations in the Forms 403 and test notifications were knowing and deliberate.

100. Bacon's various "understandings" of Commission forms and rules were based upon his admitted reading of the rules and his interpretations, not upon the advice of counsel.[16] Bacon claims that he did not "appreciate the

[16]Bacon complains he received no advice concerning the Form 403 or test notifications from his attorney. However, neither did he ask for any advice. Bacon does not alleged counsel advised him to make any misrepresentations. (Statement, pp. 28-29, 33) Bacon states that his attorney's "regular practice was not to give such advice, as he felt that the Commission's rules were self explanatory . . . and he generally referred me to a section of the rules", and that Bacon rarely questioned the attorney regarding such matters. Bacon states he was discontinuing the services of his attorney "at the time . . . due principally to disagreements", which are unspecified. Bacon explicitly states he was attempting to "save legal fees." To Bacon, the Forms 403 appeared "simple, mechanical matters" and "with finances as tight as they were this was a major consideration." Bacon states he had "not yet formalized" a relationship with new counsel and he "certainly did not want to stop and take a lot of time unnecessarily to confer with new counsel" and he "felt that I could simply read the FCC Rules myself and file the papers." In fact Bacon was conferring with new counsel between December 1973 and June 1974 in preparation for the Idaho PUC hearing on certification for Coeur d'Alene. (Para. 49, supra) Bacon's own statements make it clear that he did not seek the advice of counsel because he did not wish to spend money on what *he* considered a *simple* matter which did not *require* the advice of counsel. In view of these admissions, we have no issue before us of attorney incompetence, malfeasance, or neglect. Bacon's inferences of attorney neglect are neither relevant nor credible as an excuse for Bacon's alleged "lack of understanding" of Commission forms, rules,

functional distinctions between equipment and service tests, but that notification of both was clear." He claims to have understood that the primary purpose of Section 21.212 of the rules was to "alert FCC monitoring installations to the presence of new emissions on previously unassigned frequencies", and that the dates noticed would have merely been the earliest permissible and that tests could commence anytime thereafter. (Statement, p. 27) There is no distinction between equipment or service tests of any pertinence here. What is pertinent is that Bacon represented to the Commission that the channels were operational and ready for testing, and that tests would be conducted in June 1974. Bacon's understanding of the *purpose* of the rule 21.212 is irrelevant. He admittedly understood that notification and tests were required after construction, and he filed notification although no construction had taken place. In view of the absence of equipment and facilities for construction of the 454 MHz channels in June 1974, Bacon's plan to stretch construction out through 1976, and the failure to conduct equipment tests at all, we find Bacon had no intention in June 1974 of conducting tests then or at any time soon thereafter, and that his statements to the contrary were knowingly false.

101. Bacon understood that the Forms 403 and test notifications were required to be filed before expiration of the construction permits. (Statement, pp. 27-28) Bacon also states he did not understand the difference between a construction permit and covering license application, that he was not aware of the Form 701 (an application for extension of the CP) or of the Form 403 for partial comple-

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or requirements. Rather, Bacon's judgment is called into question in failing to seek the advice of new counsel if he was dissatisfied with current counsel. We cannot find that Bacon was bereft of, or prevented from obtaining, counsel in regard to the Form 403 and test notifications. Rather he *chose* to not avail himself of counsel.

tion of construction. (Statement, p. 29) Whether or not Bacon was aware that a method existed for extending the dates upon which construction could be completed, and the permits would expire, is not of relevance to whether the misrepresentations regarding the state of construction in the Forms 403 and the notifications were deliberate. Bacon essentially implies that if he had been aware of the possibility of gaining extra time to construct he would not have made the misrepresentations. This is not evidence of the absence of an intent to mislead. Bacon was under no compulsion to misrepresent the facts in the Forms, or to submit notifications when construction was not complete. Bacon claims to have understood he was required to file a Form 403 and test notifications. In doing so, he knowingly and deliberately misrepresented the state of construction of the 454 MHz channels.

102. Bacon states that he did not appreciate the "legal significance of the dual events of test notification and license submission", and if he had, he would have consulted an attorney or the Commission regarding the "accuracy of statements made under my signature and the precise meanings of items on the application forms and in the FCC's Rules." Bacon states he did not "focus on . . . nor . . . formulate any understanding of, the terms in Items 3(c) and 3(d) of Form 403". (Statement, pp. 29, 33) First, that the Forms 403 and service and equipment test notifications were submitted together has no legal significance. There is significance to the fact that both submissions contained similar material misrepresentations of fact. Second, Bacon's claim that he would have been concerned about the accuracy of his statements, if he had understood this "dual significance", implies that Bacon considers that as a licensee he had no obligation to be concerned about the accuracy of representations he

made to the Commission because the representations were not "significant". Licensees have an obligation to not mislead, falsify or misrepresent facts to the Commission. The obligation extends to both material and nonmaterial facts. The fact of misrepresentation is more important than the facts misrepresented. *FCC v. WOKO, Inc.*, 329 U.S. 223 (1946) Here the facts were material. Third, Bacon's claim that he did not understand Sections 3(c) and 3(d) of the Forms 403 is simply unbelievable. Item 3(c) asks "When was the construction specified in 3(a) completed?", and Item 3(d) asks "Is the station now ready for operation?" The questions, to which Bacon responded "June 4, 1974" and "Yes", respectively, present no ambiguities or difficulties to understanding. Bacon is a literate, educated person, having earned an undergraduate degree, and completed one year in a graduate business degree program at the University of Pennsylvania. Bacon had operated two RCC businesses for several years prior to June 1974. Since *no* construction of *any* of the 454 MHz channels had taken place in June 1974, and since essential equipment and facilities had not even been ordered, it is not possible that Bacon interpreted or construed the word "construction" to mean only some construction. [17] The fact that Bacon represented in the Forms and the notifications that the channels were ready to operate demonstrate that he understood "construction" to mean completely constructed. In view of Bacon's not having ordered essential equipment and facilities by June 1974, while representing in the Forms 403 and the notifications that the 454

[17]Bacon states that he does not now recall whether he considered control circuits in connection with the Forms 403, implying that only control circuitry was lacking and not apparently part of the 454 MHz construction referred to by the Form 403. (Statement, p. 33) Since other essential equipment had not yet been ordered or installed in June 1974, this is no explanation.

MHz channels were constructed and ready to operate, in view of the impossibility of Bacon's having failed to understand the meaning of his representations, and in view of Bacon's plan to stretch construction of the 454 MHz facilities through 1976, we find that no "misunderstanding" of the Form 403 terms, or of Commission rules or requirements, caused the misrepresentations. They were knowing and deliberate.

103. Bacon states that he did not knowingly misrepresent the state of construction in the Forms 403 and the test notifications, because in June 1974 he believed that what "remained to be done was minute in comparison" with what had already been done, that he was "anxious to get on the air", and that "lengthy delay was unthinkable" because of pressing demand for service. Bacon states that if the equipment and telephone facilities "had been available" he would have initiated service over the new frequencies "within weeks after the construction permit awards." (Statement, pp. 27, 30) The reason equipment and facilities were not available was that Bacon did not order them. (Para. 18, 19, 28, 29, supra) Bacon's assertion in his "Statement" that he believed in June 1974 that what remained to be done was "minute" in comparison with what had already been, and that installation of Pass Word's control circuitry was a mere formality which could be completed in 24-48 hours are misrepresentations. (Para. 90, supra. Statement, pp. 66-67) In view of Bacon's not having ordered essential equipment and facilities for the 454 MHz facilities by June 1974, it is impossible to find that Bacon could have held such beliefs. Bacon's claim that he was anxious to get on the air because of pressing demand is not plausible because there is no evidence of pressing demand. (Para. 79-82, supra) Not only has Bacon failed to present any credible reason in his "Statement" for finding that the misrepresentations in the

Forms 403 and the test notifications were innocent, but Bacon repeated in his "Statement" the deliberate misrepresentation in his 1976 sworn affidavit that he believed in June 1974 that construction was complete or almost complete. (See Para. 89, 90, supra. Para. 107, infra)

104. Bacon asserts that he filed the Form 403 and the test notifications in order to prevent delay, and because he understood that untimely filing was the "main evil to avoid." (Statement, pp. 27-28) Assuming that Bacon was prompted by such motives in June 1974, the misrepresentations are not thereby excused. Nothing prevented Bacon from providing candid answers to questions in the Forms 403. The rules explicitly require service and test notifications only if construction is completed. FCC Rules and Regulation, Section 21.212(a). Bacon's explanation that he submitted the Forms 403 and the test notifications with the intention of preventing delay in the construction of the 454 MHz facilities is both disingenuous and revealing. Bacon states that delaying construction was alien to his way of dothings and that his entire "experience had been with the difficulty of obtaining frequencies in the first place." (Statement, p. 30) Bacon does not explicitly state why he believed informing the Commission of the actual state of construction would *delay* construction. It is apparent, however, that Bacon believed his authority to construct and/or operate would be terminated or impaired if he informed the Commission of the actual state of construction of the 454 MHz facilities. It is not unreasonable to conclude, and we do conclude, that Bacon deliberately misrepresented the state of construction of the 454 MHz channels in the Forms 403 and the test notifications in order to mislead the Commission and to thereby prevent the termination or impairment of his authority to construct and operate the 454 MHz channels.

105. Bacon disputes that Exhibit 8 of Pass Word's October 6, 1975 amendment to its July 1975 application for additional frequencies contains any misrepresentations. (Statement, pp. 62-65). Bacon defends the following statements made in that document:

> A 21.516 showing is not provided for frequencies 454.025 and 454.075 because these facilities, although constructed, cannot be put into service due to unavailability of wire-line control facilities. General Telephone Company of the Northwest is carrying out a major construction project to provide wire-line facilities for applicant and has given assurance that these facilities will be available no later than December 1, 1975. Consequently a waiver of 21.516 is requested for 454.025 and 454.075.

In fact, the October 6, 1975 amendment misrepresents that the telephone company promised control circuitry for the 454.075 MHz channel by December 1, 1975, that circuitry was unavailable when Bacon simply had not ordered it, and that the 454.075 MHz channel was otherwise already constructed. (Para. 87, supra) In his "Statement", Bacon repeats the misrepresentation that General Telephone had promised installation of the circuits by December 1, 1975. (pp. 62-64) Bacon explicitly admits that General's construction program for installation of those circuits was not "major", as alleged in the application, but terms that statement mere "hyperbole", not misrepresentation. (Statement, p. 63) Bacon characterizes his statement that General had promised installation of the 454.075 MHz control circuit by December 1, 1975 as "optimistic overstatement". (Statement, p. 65) In view of his not having ordered the 454.075 MHz circuit until March 1976, we find it was a knowing misrepresentation. His assertion that circuitry was "unavailable" was also a knowing

misrepresentation, in view of Bacon's own admissions which demonstrate that any "unavailability" was due to Bacon's actions and was within his control. (Para 71, supra)

106. Bacon defends the misrepresentation in the November 19, 1975 letter of his counsel to the Mobile Services Division as an innocent "error", not as knowing or deliberate. (Statement, p. 65) The letter misrepresented that Pass Word's two 454 MHz channels were activated earlier in November 1975, when in fact only the 454.025 MHz channel had been activated. (Para. 88, supra) Bacon explains that he told his counsel on November 12, 1975, that "two UHF frequencies" were on the air, and that counsel understood this to mean two *Pass Word* 454 MHz frequencies, while in fact one Pass Word and one Coeur d'Alene 454 MHz frequency had been activated. Bacon claims he did not see the letter before it was mailed out and that when he received his copy, he filed it "without noting the error". The letter was in response to the Common Carrier Bureau's request to submit a traffic load study for the 454.025 and 454.075 MHz channels and denial of Bacon's request for a waiver of that study. Bacon does not claim that he was unaware of the purpose of the November 19, 1975 letter. Bacon's explanation implies that his counsel should have guessed that Bacon was not talking about the two Pass Word frequencies. In view of the nature of the Bureau's explicit request and the reason for the request, we cannot accept that Bacon's failure to inform his counsel of the facts with regard to the Pass Word facilities, or his ambiguous statements to counsel, were anything but a knowing and deliberate attempt to mislead the Commission.

107. Bacon defends his statements in the sworn affidavit attached to Pass Word's March 1976 "Opposition", as "naive" perceptions that may have not been well found-

ed. (Statement, pp. 66-67) The affidavit misrepresented that General Telephone failed to honor requests for control circuitry for over a year after June 1974, that construction of the Pass Word 454 MHz channels could have been completed in an afternoon in June 1974, and that Bacon believed installation of control circuitry was a mere formality that could have been completed in 24-48 hours. (Para. 89, 90, supra) Bacon defends his "naive" perceptions by claiming that he was unrealistic about the realities of his situation. To the contrary, Bacon was very realistic. He planned, and executed his plan, to construct the four 454 MHz channels of Pass Word and Coeur d'Alene through 1976 because of self-imposed financial limitations. Bacon did not begin ordering control circuitry for the Pass Word channels until after June 1974—he had not made unavailing efforts for a year prior to June 1974. (Para. 71, supra) It was impossible for Bacon to have reasonably believed in June 1974 that construction could have been completed in an afternoon or that control circuitry was a mere formailty that could be completed in one or two days, because essential equipment had not been ordered for the two Pass Word frequencies and because control circuitry had not yet been ordered. (Para. 18, 19, 71 supra) Accordingly, we find that Bacon's affidavit contained knowing and deliberate misrepresentations.

108. Bacon defends the misrepresentation in Pass Word's March 8, 1976 "Opposition", that both of the 454 MHz channels of Pass Word were activated in November 1975 (Para 91, supra) by claiming that when he saw the pleading prior to its filing he just "glanced through it and placed it in my file since it was past history at that point," failing to notice the inaccuracy. (Statement, p. 66) Attached to the "Opposition" was an affidavit signed by Bacon, stating that all the facts therein were true to his knowledge and belief. By letter dated April 5, 1976, Bacon

told the Mobile Services Division that only one of the Pass Word 454 MHz channels was activated in November 1975, and that he was still unable to acquire control circuitry for the second. Bacon asserts that the letter shows that no intentional misrepresentation was made by his attorney in the letter of November 19, 1975 or in the March 8, 1976 pleading, and no misrepresentations were made by Bacon in the April 5, 1976 letter. (Statement, p. 66) The issue is not whether Bacon's attorney made deliberate misrepresentations. Bacon has admitted that he was the source for the information in the letter of November 19, 1976. The pleading merely repeated the misrepresentation of the November 19, 1975 letter. Bacon read the pleading prior to its filing and signed the affidavit asserting the truth of the facts stated in the pleading. We find that the March 8, 1976, "Opposition" merely repeated the deliberate misrepresentation of the November 19, 1975 letter, and that Bacon knowingly and deliberately let that misrepresentation be repeated. The April 5, 1976 letter misrepresents that the lack of control circuitry was attributable to the telephone company, when it was attributable to Bacon's failure to order it until sometime in March 1976, and misrepresents that if it were not for the lack of circuitry, the channel could have been activated. (Para. 91, supra) Bacon was fully aware that he actually ordered the control circuitry in March 1976, and that the base station equipment had not yet been installed. Accordingly, we find that the misrepresentations in the April 5, 1976 letter were also knowing and deliberate.

109. The July 1975 application, and October 28, 1975 amendment, of Coeur d'Alene for additional frequencies, misrepresented that the 454.125 MHz and 454.175 MHz channels were actually serving 12 and 13 units respectively. Bacon also misrepresented in the October amendment that

control circuits were promised by October 20, 1975 and that without them held orders on those channels could not be filled. (Para. 94, 95, supra) Bacon claims that the traffic load showing and his statements concerning actual usage reflected a "projection of expected typical utilization" on the 454 MHz channels, that the misrepresentations were not "motivated by an intention to deceive", and that he should not have submitted the traffic load showing but should have asked for a waiver. Bacon attributes the misrepresentations to "inattention to the purposes of the rules," without identifying which rules. (Statement, pp. 67-69) The misrepresentations in the application and amendment were not innocent. Bacon does not allege that he understood the rules to require traffic projections with applications rather than actual traffic information. Bacon had new counsel, who transmitted the application and amendments to the Commission. When *Pass Word's* July 1975 application was submitted, Bacon did not submit a load study, and was later asked to do so by the Bureau. However, Bacon's July application for Coeur d'Alene contained the fabricated traffic load study. The application explicitly stated that "applicant *is providing service* to 12 units on 454.125 MHz and 13 units on 454.175 MHz". (Emphasis added) Bacon now admits neither were in operation at the time. (Statement, p. 68) When the Bureau requested Bacon to explain why held orders were not being served, when there was no congestion on the 454 MHz channels, Bacon repeated the misrepresentation that the 454 MHz channels were actually serving 25 units, and added the misrepresentation that until control circuitry promised by October 29, 1975 were provided, the held orders could not be served. In fact Bacon did not order the control circuit for 454. 175 MHz until March 1976. It is not possible that the traffic load study was intended to reflect expected utilization. It, the application, and the

amendment constituted knowing misrepresentations that the 454.125 and the 454. 175 MHz channels were operational and serving 25 customers at the time of the application. Bacon deliberately misrepresented that the 454 MHz channels were operational, and concealed the fact that they were not constructed, in order to obtain authority for additional channels.

110. Bacon characterizes his April 1, 1976 and April 13, 1976, amendments to the July 1975 Coeur d'Alene application as "corrective" and "clarifying," and offers them as proof of his lack of intention to deceive. (Statement p. 67). However, the two amendments misrepresented that Bacon had made every effort to obtain control circuitry for the Coeur d'Alene channels and that lack of circuitry was responsible for the late construction of the Coeur d'Alene 454 MHz channels. (Para. 96, supra) The two April amendments admitted that as of April 1, 1976, only the 454.125 MHz channel was in operation and that the 25 units of the original application were in fact served by Pass Word and not by Coeur d'Alene's 454 MHz channels. However, those amendments were filed after the Commission had already been alerted to the fact that Bacon had not constructed or operated the Pass Word 454 MHz facilities before expiration of the construction permits, and that misrepresentations concerning those channels had been made. We cannot view these corrections as entirely voluntary. More importantly, they contained misrepresentations regarding Bacon's responsibility for the late construction and operation of the Coeur d'Alene 454 MHz facilities. These misrepresentations clearly were designed to prevent investigation into Coeur d'Alene's late construction and operation. In view of Bacon's knowledge regarding the actual dates on which essential equipment was ordered and installed, and on which control circuitry was ordered, we find that the amendments knowingly and

deliberately concealed Bacon's responsibility for the late construction of Coeur d'Alene's 454 MHz channels.

Proffered Mitigation

111. Bacon claims as a mitigating circumstance his youth, having been 28 years old in 1974, when the construction permits for the 454 MHz channels expired without construction having been completed, and when the first of the misrepresentations regarding construction and operation of those channels took place. Bacon claims his youth led him to become a "workaholic" and "impatient, incautious, and inattentive." Bacon states that his "personal life" is more ordered and that he is capable of dealing with "pressure situations in business" now. There is no evidence that Bacon was a "workaholic" or that the duties of managing Pass Word and Coeur d'Alene were so numerous or burdensome so as to cause late construction. The misrepresentations were not the result of impatience, lack of caution or inattentiveness. They were deliberate and made with the studied purpose of deceiving the Commission regarding the late construction and operation of the 454 MHz facilities, of concealing Bacon's responsibility therefor in efforts to gain further frequency authorizations, and to prevent Commission inquiry. The late construction and operation were planned, deliberate, and due to foreseeable circumstances within Bacon's control, known to him before he even filed applications for the channels. Bacon was old enough, educated enough and experienced enough in business matters and the RCC industry to have understood that the late construction and operation and his course of deliberate misrepresentations and concealment were not minor indiscretions, but serious matters.[18]

[18]Even if we could be persuaded that "youth" was a causative factor here, it would not constitute mitigations. *Puerto Rican Advertis-*

Additionally, Bacon requests consideration under section 1.92 (e) of the Rules of corrective measures Bacon states he has taken to "minimize the possibility of reoccurrences of past mistakes." Namely, that he has retained technicians to do maintenance and installation work and an engineer to do systems planning; hired people to assume duties Bacon had formerly executed in regard to sales, personnel, accounting and inventory; and obtained legal counsel on a retainer basis rather than continuing his prior "as needed" use of counsel. The Commission need not consider evidence of remedial measures taken after the licensee is on notice that the Commission is aware of his wrongdoing, once a determination has been made that deliberate misrepresentations have taken place. *Sea Island Broadcasting Corp.*, 60 FCC 2d 146 (1976), *aff'd*, F.2d, No. 76-1735 (D.C. Cir. Jan. 14. 1980).

112. Bacon claims in mitigation that revocation would lead to some employees of Pass Word and Coeur d'Alene losing their jobs. This does not constitute mitigation where there has been deliberate deception of the Commission or deliberate statutory violations. *KWK Radio, Inc.*, 35 FCC 561 (1963).

113. Bacon also claims in mitigation that revocation would have an extremely harmful economic impact upon his parents and upon himself. In this connection we note

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ing Co., Inc., 9 FCC 181 (1942). In *Puerto Rican Advertising*, a principal of the license applicant engaged in one misrepresentation at the age of 23, six years before the application in question and in connection with an unrelated matter, and no repetition occurred during the interim. Additionally, this occurred before the principal's association with the applicant, and the other principals were totally unaware of this prior misconduct. That we considered the youth of the offending principal in mitigation there, in no way requires or permits us to consider Bacon's claim of "youth" in mitigation.

that Bacon's father is now deceased and that an application for transfer of control of his 50.5% interest in Pass Word has been filed. The application names the Executor as the transferee, and the will names Bacon's mother as the heir to that 50.5% interest in Pass Word. Additionally, Bacon's mother is made heir to a monthly stipend from Pass Word's revenues. We have consistently held, and do so now, that innocent shareholders cannot be immunized from the consequences of corporate deception. *WMOZ, Inc.*, 36 FCC 202 (1964). *Independent Broadcasting Company v. FCC*, 193 F.2d 900 (D.C. Cir. 1951). *FCC v. WOKO, Inc.*, 329 U.S. 223 (1946). *KWK Radio, Inc.*, 35 FCC 561 (1963). Nor is the recipient of an annuity or stipend in any different position than a shareholder. Financial hardship to a licensee or its principal, and loss of investment (necessarily resulting in loss of income) are not factors in mitigation where there has been a pattern of misrepresentation. The question is the relationship of the remedy to the misconduct. *Radio Broadcasters*, 23 FCC 2d 209 (1970). *Fred Kaysbier*, 34 FCC 2d 788 (Rev. Bd. 1970).[19]

114. Bacon also claims that "a factor to be considered in mitigation" under Section 1.92(e) of the Rules is past meritorious performance of the licensee. Specifically, Bacon claims that Pass Word and Coeur d' Alene currently serve some 800 widely varied customers on 900 units, that major service complaints have been few, that short-

[19]In several limited situations, the Commission has, because of equitable considerations, allowed a wrongdoer to transfer his license rather than be denied renewal thereof, noting the financial impact on innocent parties. The instant case is readily distinguishable from those cases, which found, for example, that the wrongdoer was not, due to illness, responsible for her acts (*Cathryn C. Murphy*, 42 FCC 2d 346 (1973)) or was so disabled that he had no other means to support a family (*Martin R. Karig*, 3 RR 2d 669 (1964).

term large-scale emergency service has been provided to a school district, a public utility and to unions during a strike, that short term non-emergency service has been provided to tournaments and convention groups, and that customers have been very satisfied with service, in support of which Bacon submits affidavits claimed to have been executed by 60 customers. Consideration of the past record of a licensee in revocation proceedings is discretionary. FCC Rules and Regulations, Section 1.92(e). Where there has been a pattern of deliberate deception, past meritorious performance and public service by the station generally are insufficient to mitigate the adverse inference raised.[20] *Sea Island Broadcasting Corp., supra. WMOZ, Inc.*, 36 FCC 202 (1964). *Carol Music. Inc.*, 37 FCC 979 (1964). *Immaculate Conception Church of Los Angeles v. FCC*, 320 F.2d 795, 116 U.S. app. D.C. 78 (D.C. Cir. 1963).

115. Bacon claims as mitigation his reputation and standing in the community, citing his presidency of two RCC trade associations, membership in NARS, and membership in several civic and social organizations, in Spokane and Coeur d'Alene. We have consistently held, and do so again, that excellent general character and reputation in the community, which we assume of all licensees, is not mitigation in cases of deliberate falsification and misrepresentation. "Character" relates to the con-

[20]In *Cosmopolitan Broadcasting Corp.* v. *F.C.C.*, 581 F.2d 917 (D.C. Cir. 1978), the Court of Appeals remanded a proceeding to the Commission to determine whether past programming may have mitigated serious policy violations. We have reviewed that decision in the context of this case. The service claimed by Bacon to be meritorious is nothing different than that expected of a carrier, and certainly does not establish that revocation will deny the communities a unique service offering. Furthermore, *Cosmopolitan* did not involve a pattern of deliberate misrepresentation by the licensee. Therefore, the decision is of limited precedential value here.

duct of the licensee or permittee vis-a-vis this Commission. "No matter how unblemished the reputation of the principal in the community, no one is allowed 'one bite' at the apple of deceit." *Sea Island Broadcasting Corp., supra. Nick J.Chaconas,* 35 FCC 2d 698 (1972). *WMOZ, Inc.*, 36 FCC 202 (1964).

116. Bacon claims as mitigation that he did "not attempt to hide the fact that KMM 697's UHF channels were not operational" because he disclosed the effect of the lack of control circuitry upon activation in February 1975 in an unrelated proceeding, *Blue Mountain Mobilphone,* Dockets 20209, 20210. Even in this claimed mitigation, Bacon demonstrates a continuing lack of candor. The 2 KMM 697 UHF channels were not only not operational in February 1975, they had not even been constructed and control circuitry had nothing to do with late construction. We are concerned not only with the late construction and operation of Pass Word's Station KMM 697 454 MHz facilities, but also with Coeur d'Alene's two 454 MHz channels, which were neither constructed nor operational in February 1975, and which were not mentioned in *Blue Mountain.* In view of the repeated misrepresentations in applications, pleadings, and correspondence with this Commission specifically relating to station files, we cannot conclude that this half truth, which was never directed toward any station files, in any way constitutes a voluntary correction of the misrepresentations before, and certainly not after, February 1975. As we stated in our designation order herein, "Mr Bacon's disclosures in the *Blue Mountain Mobile Phone Co.* hearings did not complete the record or result in the correction of the station files and applications of Pass Word and Coeur d'Alene Answering Service, and certainly do not excuse the totality of his conduct." 61 FCC 2d 410.

117. Bacon also claims as a mitigating circumstance that he has fully disclosed the facts to the Commission in his "Statement." Even if this were in fact so, we could not agree that mitigation has been demonstrated. *Monroe Broadcasters, Inc.*, 60 FCC 2d 792 (1976). Mitigation exists where the licensee brings its derelictions to the attention of the Commission itself, not where cooperation is forthcoming only after it is clear that further concealment is no long feasible. *Melody Music* (WGMA), 36 FCC 701 (1964). In fact, rather than make a full disclosure, Bacon continued to misrepresent in his "Statement" that the telephone companies' failure to provide control circuitry was responsible for late construction and operation of the four 454 MHz channels, despite admissions in the "Statement" making that impossible. In his "Statement", Bacon also misrepresented the source of Pass Word's economic difficulties, in an effort to conceal his responsibility for the late construction and operation of the four channels at issue herein. Only when Pass Word responded to the Bureau's inquiries, after Pass Word's waiver of hearing and its "Statement" was filed, did it become apparent that the only source of Pass Word's alleged financial difficulties was Bacon's financing of the acquisition of the Loomis answering service by extremely burdensome debt, rather than the multiple sources alleged. Accordingly, even if cooperation during a revocation hearing could be considered as mitigation, it did not exist here, but rather the pattern of misrepresentation continued.

Standard of Proof

118. This matter first came before the Commission on December 19, 1979. On that date, we voted to revoke all licenses and deny all applications of Pass Word and Rodney Bacon d/b/a Coeur d'Alene Answering Service,

for the reasons set forth in detail *supra*. At that time, the standard of proof used by the Commission in a revocation proceeding was the "preponderance of the evidence" test. *Sea Island Broadcasting Corp.*, 69 FCC 2d 1796 (1978). On January 14, 1980, before this decision was released,[21] the U.S. Court of Appeals for the District of Columbia Circuit held, on appeal of *Sea Island*, that "revocation of an FCC license is governed, at the agency level, by the "clear and convincing" standard of proof set forth in the *Collins* decision for an SEC revocation of a broker's license."[22] *Sea Island Broadcasting Corp. v. F.C.C.*, F.2d, No. 76-1735 (D.C. Cir., Jan. 14, 1980). Accordingly, we have recanvassed the record to determine whether the evidence satisfies the standard announced by the Court of Appeals. This review readily persuades us that the evidence concerning Bacon's actions and representations to this agency clearly and convincingly establishes his deliberate failure to construct and repeated and deliberate misrepresentations regarding the construction and operation of the Pass Word and Coeur d'Alene 454 MHz facilities.

Conclusions

119. Rodney Bacon, as president and a principal owner of Pass Word, Inc. and as President and sole owner of Coeur d'Alene Answering Service, deliberately constructed and began operation of the 454.025, 454.075, 454.125, and 454.175 MHz channels of Pass Word and Coeur d'Alene long after the construction permits for those frequencies expired. Late construction and opera-

[21] A news release of the December 19 action was released on Dec. 21, 1979. However, a Commission action does not become effective until the order itself is released. See *MCI v. F.C.C.*, 515 F. 2d 385 (D.C. Cir. 1975).

[22] The case referred to is *Collins Security Corp. v. SEC*, 562 F. 2d 820 (D.C. Cir. 1977).

tion was entirely a matter of Bacon's independent business judgment. Bacon repeatedly and deliberately misrepresented and concealed facts over a three year period in forms, correspondence and pleadings before this Commission regarding construction and operation of the 454 MHz channels, in order to obtain licenses to cover construction of those channels, to obtain permits for the construction of additional channels, and to forestall Commission inquiry into the late construction and operation of the 454 MHz channels and Bacon's responsibility therefor. The only appropriate remedy for such flagrant, unmitigated disregard of licensee responsibility is revocation.

120. Bacon protests that lack of candor and failure to construct with diligence are not bases for revocation under Section 312 of the Communications Act, that revocation has never been ordered against a radio common carrier, and that a lesser penalty should be imposed. Bacon also contends that the mere issuance of the show cause order in this proceeding has discredited the "old assumption" that radio common carriers are "wholly or partially immune from major administrative sanctions." (Statement, pp. 59-61, 79-81)

121. There is no question that revocation is an appropriate remedy under the Act where there has been a repeated pattern of deliberate misrepresentation and concealment to this Commission. § 312(a)(1). *FCC v. WOKO, Inc.*, 329 U.S. 223 (1949). *Sea Island Broadcasting Corp.*, 60 F.C.C. 2d 146 (1976), *aff'd*, F.2d, No. 76-1735 (D.C. Cir. Jan. 14, 1980). This same standard is applied to common carrier licensees. *The Telephone Co., et al.*, 65 F.C.C. 2d 605 (1977).

122. Bacon argues that lack of diligence in construction is not a ground for revocation under Section 312(a) of

the Communications Act, or under the designated issues in this proceeding. First, we explicitly designated *as an issue* in the revocation phase of this proceeding:

> to determine the facts surrounding the construction and operation of the 454 MHz facilities . . . and whether the licensee was diligent in constructing and operating the facilities. . .

(Para, 41, 42). Section 312(a)(2) grants authority to the Commission to revoke a construction permit or license because of conditions coming to the attention of the Commission which would warrant it in refusing to grant a license or permit on an original application. Section 312(a)(3) explicitly grants authority to the Commission to revoke a license for willful or repeated failure to operate substantially as set forth in the license. Had we been apprised that the 454 MHz channels had not been constructed and ready to operate by the expiration date of the construction permits *and why*, we would have been warranted in refusing to grant a license to cover those channels and in revoking the construction permit. Bacon did not in fact construct the channels in a timely manner and demonstrated no diligence in attempting to do so. Bacon willfully failed to construct and provide service and thus to operate as set forth in the licenses. It is important that a permittee, having received a valuable privilege, take immediate steps to construct the facilities that are to be dedicated to public service. A disregard for the construction period terms not only deprives the public of the service which has been represented as unfulfilled, but also ties up the frequency so another applicant is unable to meet the need. Thus, even if these had been no deliberate misrepresentation, revocation would have been appropriate in the factual situation described herein.

123. Bacon requests a penalty less severe than revocation, stating that he has already been penalized by the necessity of spending $12,000 in connection with this proceeding, and that he has been chastened to keep to a "new standard of care." Bacon requests that instead of revocation, Pass Word and Coeur d'Alene pay up to $6,000 in forfeitures, that they dismiss with prejudice the applications at issue in Docket 20942, 20943, and 20944, and that they take steps to ensure that the events leading to the show cause order in this proceeding are not repeated, i.e., that counsel is retained, that internal reorganization plans for Pass Word and Coeur d'Alene are executed, and that employees are educated as to the requirements of Part 21 of the Commission's rules. Bacon asserts that there is Commission precedent for accepting voluntary forfeitures, although not identifying any.

124. Bacon's request that forfeitures be assessed is unacceptable. Forfeiture is not an appropriate sanction where willful efforts to deceive the Commission have taken place. Forfeiture and revocation are not interchangeable remedies. *Sea Island Broadcasting Corp.* supra. Accordingly, we must reject Bacon's proposal of penalties other than revocation.

125. In view of Bacon's demonstrated lack of character qualifications to be a Commission licensee, we deny the applications of Pass Word and Coeur d'Alene in issue in FCC Dockets 20942, 20943, and 20944. Additionally, the various applications which Pass Word and Coeur d'Alene have filed since the issuance of our show cause order, and which have been held in abeyance pending resolution of FCC Dockets 20939 and 20940,[23] are

[23] Pass Word applications, File Nos. 20202-CD-P(2)-78); 20480-CD-P(4)-78; 20333-CD-P-78; 21222-CD-P(2)-76. Coeur d'Alene application, File No. 20203-CD-P(2)-78.

denied. *The Telephone Company, et al.*, 65 F.C.C. 2d 605 (1977).

126. In revoking the licenses of Pass Word and Coeur d'Alene, and in denying the current applications of Pass Word and Coeur d'Alene for additional frequencies, we are cognizant of the public interest in the provision of service in the Spokane, Washington and Coeur d'Alene Idaho area. Bacon contends that revocation would have the effect of *temporary* loss of service to some customers. He points out that there will be no provider of service *operating* in Coeur d'Alene, Idaho. (Statement, p. 75) Bacon serves both Spokane and Coeur d'Alene from Mica Peak, and it is not reasonable to assume others could not. Several RCC's already operate and provide service in Spokane, Washington. In fact some already have locations in Coeur d'Alene.[24] There is no reason to believe that service will be unavailable in either Spokane or Coeur d'Alene.

127. Accordingly, IT IS ORDERED, That all outstanding licenses and permits of Pass Word, Inc. and Rodney Bacon d/b/a Coeur d'Alene Answering Service are REVOKED.

128. IT IS FURTHERED ORDERED, That all pending applications of Pass Word, Inc. and Rodney Bacon d/b/a Coeur d'Alene Answering Service for construction permits and licenses are DENIED. No comparative phase of these proceedings shall be held.

129. IT IS FURTHER ORDERED, That Pass Word, Inc. and Rodney Bacon d/b/a Coeur d'Alene Answering

[24]Robert S. Ditton and Mobilfone Northwest operate in both Spokane and Coeur d'Alene. Courtesy Communications and Coronet Enterprises operate in Spokane.

Service ARE AUTHORIZED to continue to operate Stations KMM697, KOA271, KRS678, KUC918, KWU337 and KUO646 until 12:01 a.m. April 27, 1980, to enable the licensees to conclude the stations' affairs; PROVIDED, HOWEVER, That if the licensees seek judicial review of our decision, they are authorized to continue to operate the named stations until thirty (30) days after final disposition of such appeal.

130. Finally, IT IS ORDERED, That proceedings in FCC Docket 20941 shall commence.

FEDERAL COMMUNICATIONS COMMISSION,
WILLIAM J. TRICARICO, *Secretary*.

APPENDIX C
BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Revocation of the Licenses of PASS WORD, INC.	Docket No. 20939
Licensee of Stations KMM697, KOA271, KRS678 and KUC918 in the Domestic Public Land Mobile Radio Service and	
RODNEY J. BACON d/b/a COEUR D'ALENE ANSWERING SERVICE	Docket No. 20940
Licensee of Stations KWU337 and KUO 646 in the Domestic Public Land Mobile Radio Service and	
In Re Applications of	
COURTESY COMMUNICATIONS, INC. Spokane, Washington	Docket No. 20941 File No. 20239–CD–P–(3)–76
PASS WORD, INC. Spokane, Washington	Docket No. 20942 File No. 20604–CD–P–(2)–76
RODNEY J. BACON d/b/a COEUR D'ALENE ANSWERING SERVICE Kellogg, Idaho	Docket No. 20943 File No. 20669–CD–P–76
RODNEY J. BACON d/b/a COEUR D'ALENE ANSWERING SERVICE Coeur d'Alene, Idaho	Docket No. 20944 File No. 20014–CD–P–76
For Construction Permits in the Domestic Public Land Mobile Radio Service.	

ORDER ON RECONSIDERATION

(Adopted: April 23, 1981; Released: May 29, 1981)

BY THE COMMISSION:

Introduction

1. We have before us a "Joint Petition for Partial Reconsideration", filed by Pass Word, Inc. and Rodney J. Bacon, d/b/a Coeur d'Alene Answering Service (hereinafter Pass Word and Coeur d'Alene).[1] By our Order, the DPLMRS licenses of Pass Word and Coeur d'Alene, over which paging and two way mobile radio services are provided in the Spokane, Washington and Coeur d'Alene, Idaho areas, were revoked. We found that Rodney Bacon, the sole owner and President of Coeur d'Alene and a principal and President of Pass Word, had repeatedly made deliberate misrepresentations to this Commission to conceal his deliberately late construction of four Pass Word and Coeur d'Alene 454 MHz Channels, and his responsibility therefore. We also dismissed pending Pass Word and Coeur d'Alene applications for additional facilities. 76 FCC 2d 465 (1980).

2. Respondents requested a stay of our Order pending reconsideration in order to prepare and present an alternative sanction to revocation, designed to protect the alleged financial dependence of Rodney Bacon's mother upon Pass Word. The grant of stay (CCB 30319, Released April 9, 1980) is not to be construed as a departure from Commission policy or precedent. See *Cathryn Murphy*, 42 FCC 2d 346 (1973); *Martin Karig*, 3 RR 2d 669 (1964).

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[1] Petitioners also filed a "Motion to Exceed Page Limitation", which was opposed by Courtesy Communications. While Petitioners exceeded the limitation of 50 pages set forth in Section 1.277(c) of our rules, we shall grant the motion in order to ensure a full record.

3. Petitioners have presented not only an alternative sanction, but have also requested reconsideration of the merits upon the grounds of error of law and of fact. Petitioners have not requested reconsideration of the dismissal of applications for additional facilities. The estate of Jennings Bacon, Rodney Bacon's father, represented by the Seattle First National Bank, supported Petitioners in "Comments" and "Further Comments in Support".[2] Courtesy Communications, a competing carrier named a party herein, opposed all of Petitioners' requests. Because Petitioners have presented extensive argument in support of their claims, we shall summarize them and our conclusions herein.

Summary of Decision

4. To summarize the alleged errors of procedure and law, Petitioners claim that prosecutorial and decision-making functions were impermissibly mixed resulting in a denial of due process to Petitioners, that the Administrative Procedure Act required that each Commissioner separately indicate recognition that the evidence clearly and convincingly warranted revocation, that Petitioners were denied their right to achieve compliance with all lawful requirements before designation for hearing, that the Commission erroneously relied upon Section 312(a)(2) to revoke Petitioners' licenses, and that the Commission violated Section 214 of the Communications Act in revoking Petitioners' licenses. Petitioners, accordingly, request termination of the proceeding without revocation, or initiation of a new proceeding to correct the alleged er-

[2]The pleadings of the Seattle First National Bank were filed in response to the Joint Petition and Courtesy's "Comments" opposing reconsideration. Courtesy filed a "Motion to Strike" the Bank's pleadings. In the interests of a full record, the "Motion to Strike" is denied.

rors. We find that Petitioners' claims of procedural and legal error are either unsupported by authority, unpersuasive or mischaracterize our decision.

5. Petitioners claim that it was error to find that Bacon intended to deceive the Commission in the Forms 403 and service and test notifications submitted by Pass Word and Coeur d'Alene in 1974, that the November 19, 1975 letter from Bacon to the Common Carrier Bureau contained any deliberate misrepresentations, that Bacon was untruthful concerning the foreseeability of Pass Word's financial difficulties in 1974, that Pass Word's late construction of its 454 MHz facilities was willful or the result of lack of diligence, that debt assumed by Pass Word in the acquisition of Loomis Answering Service was the most significant cause of Pass Word's cash flow difficulties in 1974, that the financial difficulties which delayed construction of Pass Word's 454 MHz facilities were foreseeable, and that Bacon's perceptions, attitudes and basic understandings of our requirements in June 1974 are immaterial to mitigation. The alleged errors of fact either mischaracterize our findings, are contradicted by the record, or are unsupported by additional evidence or persuasive argument.

6. *Cathryn Murphy, supra,* and *Martin Karig, supra,* do not justify adoption of Petitioners' proposals. Petitioners' plan in fact is not essential to Mrs. Bacon's financial well being. Additionally, it would return Rodney Bacon to control and enjoyment of the benefits of ownership of Pass Word and Coeur d'Alene after a temporary suspension. Petitioners' plan is more in the nature of a forfeiture, and is more generous to Bacon than if he were permitted to sell his interest in Pass Word and Coeur d'Alene, remedies which we have already found not to be justified in this case. 76 FCC 2d 456, 516 n. 19, 520. Nor do Petitioners claim or demonstrate the type of licensee disability which was present in *Cathryn Murphy* or *Martin Karig.*

Alleged Errors of Law

7. We voted to revoke Respondents' licenses in our meeting of December 19, 1979. On January 14, 1980, the Court of Appeals announced a "clear and convincing evidence" burden of proof standard in revocation cases. *Sea Island Broadcasting*, 627 F.2d 240, 244 (D.C. Cir. 1980). We then reviewed the evidence herein under the "clear and convincing" standard, and again voted for revocation by adopting our Order of March 12, 1980 on circulation. Petitioners contend that 5 USC Section 552(b) was violated if the March 12, 1980 order was considered at a "closed meeting". We cannot agree. Section 552b(c)(1) excepts the deliberation in this proceeding. Moreover, the procedure by which the order was ultimately adopted did not involve any "meeting" of Commissioners. The item was circulated to each Commissioner individually, and was adopted by unanimous vote. The D.C. Circuit has approved that procedure, finding that "Congress intended to permit agency members to act on agency business that is circulated to them 'sequentially in writing.' " *Communications Systems, Inc. v. FCC*, 595 F.2d 797 (D.C. Cir. 1978) Therefore, Petitioners' Sunshine Act argument is inapposite.[3]

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[3]Petitioners further contend that *MCI* v. *FCC*, 515 F. 2d 385 (D.C. Cir. 1975) does not provide authority to "redecide" a case after the Commission has voted but before it has released its order. *MCI* held that a Commission action does not become effective for purposes of judicial review until the order adopting the action is released. See also FCC Rules and Regulations, Section 1.4(b). Petitioners cite no authority which prevents the Commission from revisiting a case on its own motion before the text of a decision is released. In any event, our prior reliance on *MCI* v. *FCC* has in no way injured Petitioners. Moreover, the Commission would have been remiss had it not reviewed the evidence under the later-announced clear and convincing standard of proof. Petitioners concede as much by arguing that certain misconduct was not clearly and convincingly shown. (The recent United States Supreme Court decision in *Steadman* v. *SEC*, U.S., 49

8. Petitioners argue, without providing legal authority therefor, that they have a due process right under the Administrative Procedure Act, 5 USC §558, to know whether "each" Commissioner recognized that "clear and convincing evidence" warranted revocation, and whether each Commissioner perceived Pass Word's "meritorious service" to be as "unimpressive" as our Order "suggests." The March 12, 1980 Order was adopted by the full Commission. Separate statements by individual Commissioners attesting to their participation are not required by any provision of law. We explicitly stated that "clear and convincing evidence" warranted revocation, and that Pass Word's prior performance was not sufficiently meritorious to mitigate Bacon's conduct in light of the pattern of deliberate misrepresentation. 76 FCC 2d 465, 516, 518. We cannot agree that §558 was violated.

9. Petitioners content that §558(c)(2) of the Administrative Procedure Act entitled them to an opportunity to achieve compliance with all lawful requirements before designation for hearing because there was no clear and convincing evidence of willfully late construction or lack of diligence. Section 558(c)(2) makes revocation unlawful unless the licensee is given notice and an opportunity to demonstrate or achieve compliance with all lawful requirements before proceedings are instituted, except in cases of willfulness. In this case, the Commission asserted facts in its Order to Show Cause, 61 FCC 2d 410 (1976), imputing intentional violations of FCC rules by Bacon. Therefore, Petitioners were not entitled to achieve compliance with "all lawful requirements" before designation for hearing. The Commission was not required to

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U.S.L.W. 4174 (Feb 2, 1981), casts considerable doubt on the continued applicability of the higher clear and convincing standard of proof announced in *Sea Island Broadcasting Co.* v. *FCC, supra.*)

proffer clear and convincing proof of that willful misconduct before designation.[4] *See generally KWK Radio, Inc.* v. *FCC*, 337 F.2d 540 (D.C. Cir. 1964) *per curiam, cert. denied*, 380 U.S. 910 (1965); *Schwebel* v. *Orrick*, 153 F.Supp 701 (D.D.C. 1957) *aff'd* 251 F.2d 919 (D.C. Cir 1958), *cert. denied*, 356 U.S. 927 (1958). Even assuming that Petitioners' legal argument is valid, they fail to identify the lawful requirements with which they were prepared to comply.

10. Petitioners contend that the Commission erroneously relied upon Section 312(a)(2) of the Communications Act in revoking their licenses, that such reliance deprived Pass Word of its fundamental due process rights to a hearing because the Commission failed to give notice that it would rely on Section 312(a)(2), and that Pass Word waived its right to hearing upon the assumption that the Commission would rely solely on Section 312(a)(1). First, we explicitly stated in our Order that "even if there had been no deliberate misrepresentation, revocation *would have been* appropriate in the factual situation described herein", not that we based our Order upon our authority under Section 312(a)(2). 76 FCC 2d 465, 519. (Emphasis added.) We explicitly held that revocation was based upon, and could be based solely upon, the pattern of deliberate misrepresentation and resultant lack of character qualification of the licensees. 76 FCC 2d 465, 519-520. Second, our designation order explicitly made the facts and circumstances surrounding the late construction, and whether such facts would require revocation, an issue. Petitioners were well aware of

[4]Moreover, the record is replete with evidence of willfully late construction, 70 FCC 2d 465, 480-501, and Bacon explicitly admitted to a lack of diligence. (Statement, p. 59) The record also abounds with evidence of willful misrepresentation.

the possibility of grounds for revocation other than misrepresentation, as evidenced by their assertion in the "Statement" of Bacon that no grounds for revocation other than Section 312(a) exist either factually or as a matter of law. (Statement, p. 59) That the Commission responded to that assertion by pointing out that other grounds could exist hardly constitutes a denial of due process, nor a denial of the opportunity to present evidence. Petitioners also assert, without providing authority therefor, that under Section 312(a)(1) the Commission may revoke a license only if there had been misrepresentation regarding that license. In fact, the Commission has revoked licenses for misrepresentations made in connection with other authorizations, when it was found that the licensee lacked the requisite character qualification. *WMOZ, Inc.*, 36 FCC 202 (1964).[5]

11. Petitioners contend that the revocation order attempts to impose, *ex post facto*, 1980 standards for extension of construction permits to the 1970's thus depriving petitioners of due process. There is no issue herein regarding the standard for grant of construction permit extension requests, as there were no requests for extensions, or denials thereof. Petitioners merely speculate that if they

[5] *WMOZ, Inc.* was remanded on other grounds. 344 F. 2d 197 (D.C. Cir. 1965) While we later permitted the licensee to assign the license not associated with the misrepresentation, that action was based upon the serious health problems of the licensee. 3 FCC 2d 637 (1966) *WMOZ, Inc.* does not provide authority for Petitioners' contentions. *See contra, Sea Island Broadcasting Corp., 69 FCC 2d 1796 (1978). But, see Donald Reynolds*, 41 RR 2d 16 (1977). The Commission limited the sanction to the station involved in the wrongdoing because the principal, who held licenses for other stations, did not participate in the wrongdoing and had no actual knowledge thereof. The principal herein, however, participated in the wrongdoing and had actual knowledge. Accordingly, Bacon's other licenses are not insulated from sanctions.

had requested extensions in 1974, they would have been routinely granted.

12. Petitioners contend that our procedures herein violated the Communications Act, Section 409(c), and the Administrative Procedure Act, Section 554(d), because investigative and prosecutorial functions were impermissibly mixed with decisionmaking functions in the Common Carrier Bureau staff, resulting in a denial of due process. The Chief, Common Carrier Bureau was designated a party in this proceeding and participated in the revocation hearing phase. Petitioners waived their right to hearing and submitted a "Statemen•" in mitigation, pursuant to FCC Rules and Regulations, Section 1.92(a)(3) and (b). The waiver took place after discovery was commenced by the Bureau, but before responses from Petitioners were forthcoming. After the waiver, the Bureau conducted an informal investigation and wrote the revocation order adopted by the Commission. Section 1.92(d) of the Rules explicitly states that the Commission may base its decision after a waiver of hearing in revocation proceedings upon "all the information available to it from any source . . . in the regular course of business." It was contemplated that once a respondent in a revocation proceeding waives the right to hearing, such cases would be brought to the Commission by Bureau staff as nonhearing agenda items. Section 1.92(d), formerly Section 1.78(d), was calculated to permit staff to recommend action to the Commission because neither the Administrative Procedure Act nor the Communications Act requires separation of functions after waiver of hearing. *Amendment of Part 1 of the Commission's Rules Concerning Revocation and Cease and Desist Proceedings,* FCC 60-1434 (By the Commission 1960) 25 F Reg. 12602. Petitioners' argument that Section 1.92(d) requires that the Office of Opinion and Review write the

recommended decision because such would be the "regular course of business", is neither explicitly nor implicitly supported by the language of Section 1.92(d). Moreover, Section 1.1203(a)(3) explicitly states that revocation proceedings conducted pursuant to Section 312 of the Communications Act are "restricted . . . *unless and until* the hearing is waived pursuant to the provisions of §1.92." (Emphasis added) The Staff's writing of the recommended decision after waiver of hearing does not constitute an impermissible mixing of adversarial and judicial functions. *Mullen, Connor & Rhyne,* 41 RR 2d 1681 (1977). Petitioners' reliance upon *Bell System Tariff Offering,* 46 FCC 2d 413 (1974), is misplaced. *Bell System Tariff Offering* was decided pursuant to §205, not §312, of the Communications Act. More importantly, the proper personnel to write that decision was neither raised as an issue nor discussed therein. Finally, while *Amos Treat v. SEC,* 306 F.2d 260 (D.C. Cir. 1962) does provide authority for the proposition that Section 554(d) of the Administrative Procedure Act is grounded in the Constitution, *Amos Treat* does not support Petitioners' claim that our procedures herein violated Section 554(d).[6] Petitioners' claim that this

[6]Moreover, *Amos Treat* implies that our procedures herein complied with Section 554(d). When Manuel Cohen was Director of the SEC's Division of Corporate Finance, that Division recommended institution of, and prosecuted, an investigation to determine whether the Treat Company broker-dealer registration should be revoked. Cohen later became a Commissioner of the SEC and voted upon staff recommendations made by the Division of Corporate Finance in that proceeding. The Court reversed and remanded, permitting the Commission to institute a new revocation proceeding "in which Commissioner Cohen will not have participated", and held that the "Commission may utilize and consider *all material* gathered and *recommendations* submitted by the Division of Corporate Finance . . . the public agency, with respect to the charges under inquiry, is entitled to the benefit of the services of its *staff* member Manuel F. Cohen, while so serving, but not to participation by him *as a Commission member.*" 306 F. 2d 266-267 (Emphasis added) Common Carrier Bureau participation

proceeding has been impermissibly contaminated by staff advocacy, and that a new proceeding must be ordered, is unpersuasive.

13. Petitioners contend, without supplying authority therefor, that Section 214(a) of the Communications Act requires that before the Commission may revoke licenses of a common carrier, the Commission must certify that there would be no adverse effect on the public convenience and necessity. Petitioners also contend, without supplying authority therefor, that since Section 214 requires the Commission to consider competition when acting upon facility applications, the Commission must also consider competitive circumstances before revoking licenses. Section 214 concerns facility authorizations, not revocations.

14. Petitioners contend, without presenting authority therefor, that Section 214(b) of the Communications Act required the Commission to give notice to the governors of Idaho and Washington that revocation of petitioners licenses was proposed, and that the States had a right to be heard regarding such a sanction. Section 214(b) by its terms applies to applications of carriers, not to revocations.

Alleged Errors of Fact

15. Petitioners concede that the Forms 403, service and test notifications, and June 1975 traffic load study of Coeur d'Alene "misinformed" the Commission with "incorrect" information, but state that those documents were not part of a "continuous and repeated attempt to mislead." To the contrary, those documents contained

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herein has been the same as the SEC's Division of Corporate Finance in *Amos Treat,* with the exception that no Bureau staff participated as a Commissioner.

deliberate misrepresentations which were repeated and enlarged upon by later communications with the Commission. Our finding of a pattern of deliberate misrepresentations was based upon an exhaustive analysis of the facts and circumstances surrounding the actual construction of the 454 MHz channels, Bacon's communications with the Commission, and Bacon's proffered explanations for the "incorrect" information submitted to the Commission. 76 FCC 2d 465, 501-514.

16. Petitioners argue that the November 19, 1975 letter from Pass Word to the Common Carrier Bureau contained no deliberate misrepresentations, that the "misunderstanding" contained therein regarding which of the four 454 MHz frequencies were of concern was "thoroughly explained" in Bacon's "Statement", and that the record was corrected by Bacon, which correction was acknowledged by the Commission. It is implausible that the misrepresentation of the November 19, 1975 letter was the result of mere misunderstanding. The facts indicate that the misrepresentation was deliberate. Our finding in regard thereto took into account Bacon's explanation in his "Statement". 76 FCC 2d 465, 511-512. Moreover, we explicitly found that Pass Word not only failed to correct the record, but that the alleged "correction" contained additional misrepresentations. 76 FCC 2d 465, 503-504. (See also 76 FCC 2d 514.)

17. Petitioners contend that the Commission erroneously found that Bacon's "Statement" contained additional misrepresentations, specifically that Bacon was "untruthful" concerning the "foreseeability" of Pass Word's financial difficulties. We made no finding regarding Bacon's truthfulness concerning the foreseeability of Pass Word's financial difficulties. Indeed, such a finding would be nonsensical. Whether a circumstance is foreseeable is a

matter of reason and not truthfulness. We found that Bacon should have foreseen that Pass Word would have financial difficulties in 1974, and that in fact he must have foreseen them because of his financially motivated plan to construct the 454 MHz facilities through 1976. 76 FCC 2d 465, 496-498.

18. Petitioners submitted a "Statement" prepared by the accounting firm of Coopers & Lybrand, which it is contended demonstrates that Pass Word's late construction of its two 454 MHz facilities was not willful or the result of lack of diligence. The Statement addresses construction of only the Pass Word facilities, and makes no attempt to justify late construction of Coeur d'Alene's two 454 MHz channels. Lybrands presents an analysis of Pass Word's cash flow situation. Lybrands attributes Pass Word's 1974 cash flow problems to debt, employee turnover, accounts receivable losses, and increasing labor costs all arising from the Loomis Answering Service acquisition, and to increased telephone service charges, and equipment additions.[7] Lybrands contends that Pass Word was unable to simultaneously accomplish three objectives: finance its uncollectible accounts receivable, service long term debt, and expand business operations. However, Lybrands nowhere states that Pass Word's cash flow problems prevented timely construction of the 454 MHz channels, or caused the entire delay in construction. Rather, Lybrands argues that the Commission erroneously found

[7]Lybrand points to unspecified equipment additions of $17,983 in 1973 and $39,402 in 1974 as having "added to the weakening cash position of the company." In his "Statement", Bacon did not identify this as a factor in Pass Word's cash flow difficulties. We must conclude that if Pass Word spent some $57,385 on additional equipment in 1973 and 1974, a decision was made that it was a better use of Pass Word's financial resources than construction of the 454 MHz facilities.

Pass Word to be financially "sound",[6] and takes issue with our findings as to the relative importance of the different causes of Pass Word's financial difficulty.

19. Lybrands contends that it is simplistic to conclude that certain increased costs were not significant in causing Pass Word's financial difficulties when revenues increased at a greater rate than those costs, because to come to that conclusion it would have been necessary that incremental revenues increase "in far greater proportion" than costs. Lybrands does not indicate the magnitude of the "far greater proportion" by which revenues must grow before an increased cost can be ruled out as a cause of cash flow problems. Lybrands does not dispute our finding that revenue growth outstripped the growth of all of Pass Word's identified increased costs, except interest expense and debt service, or that increased debt service requirements were significant to the cash shortage. Nor does Lybrands dispute our conclusion that telephone company expense, labor expense and account receivable losses declined as a percentage of revenues between 1971 and 1974, while interest expense and debt service increased as a percentage of revenues. 76 FCC 2d 465, 482-484.

20. Whether one concludes that debt attributable to the Loomis acquisition is the sole, or most important, or one of the most important causes of Pass Word's cash shortage, interest expense and debt service still emerge as significant factors in Pass Word's cash flow shortage. Petitioners' exercise in arguing which particular increased costs were most significant in causing Pass Word's cash shortage is in the final analysis a futile exercise.

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[6]To the contrary, we concluded that Pass Word did suffer financial difficulty, but that it was foreseeable, that it was not a circumstance outside Bacon's control, and that it could not excuse late construction of the 454 MHz channels. 76 FCC 2d 465, 481, 485, 495-497.

Lybrands identifies as factors increased labor costs and employee turnover, increased accounts receivable losses, and increased debt costs; all stemmed from the Loomis acquisition, a venture that Pass Word was not coerced into but voluntarily entered as a business decision. That the acquisition and operation of another business involves financial risk is hardly unforeseeable. Petitioners and Lybrands argue that it was a good business decision. Our concern is not with whether it was a good decision, but with whether, to the extent Pass Word's financial difficulty delayed construction of the 454 MHz channels, it was foreseeable that Pass Word would experience financial difficulty.

21. Petitioners argue that the financial difficulties experienced as a result of the Loomis acquisition resulted from employee turnover and delinquent accounts receivable (not from debt assumed to finance the acquisition), and that the particular problems arising from the acquisition and causes of the cash flow difficulties were "unexpected." In support, a 1971 projection by Bacon that the Loomis business would generate a positive cash flow within three months was submitted. First, whether Bacon actually foresaw in 1971 that Pass Word would experience any financial difficulty in 1974 as a result of the Loomis acquisition, or the specific causal factors arising from the acquisition, is not the issue. "The issue is whether the late construction was due to foreseeable circumstances, not unforeseen circumstances." 76 FCC 2d 465, 497. Moreover, Lybrands states that the acquisition debt was a factor. Second, and more important, Petitioners consistently state their arguments concerning the foreseeability of Pass Word's 1974 financial difficulties in relation to the date of the Loomis acquisition. The relevant time period for determining foreseeability is around the time of the applications for the 454 MHz frequencies and their

grant, when Pass Word would have to determine whether it was financially able to construct and whether an extension would be necessary if it was not able to construct. Pass Word applied for its 454 MHz frequencies in July 1972, and received the construction permit on October 9, 1973. (Coeur d'Alene applied for its 454 MHz frequencies in December 1972, and received the construction permit on January 28, 1974) The Loomis acquisition was negotiated in 1971, and Pass Word took over in February 1972. (Statement, p. 6) Bacon refers to 1972 as a "near financial disaster for Pass Word" because of the Loomis acquisition. (Statement, pp. 6-7) Yet Bacon applied for the additional 454 MHz channels in 1972. Lybrands explicitly stated that Pass Word experienced a negative cash flow in the years 1972 through 1974 as a result of the Loomis acquisition. It is simply impossible to conclude that between July 1972 and October 1973, Pass Word's financial difficulties were not apparent to Pass Word. After almost two years of running the former Loomis operations, the costs associated therewith and the negative cash flow were known whether or not they were "expected" in 1971. It is unreasonable and illogical to conclude that in July 1972, or October 1973, or June 1974 continuation of those difficulties was unforeseeable.

22. Petitioners contend that Lybrands disproved our finding that equipment *replacements* did not contribute to the Pass Word cash shortage, pointing to cash financed equipment *additions* in 1973 and 1974 of approximately $57,000. What we found was that depreciation expense did not contribute to Pass Word's cash flow difficulties because no equipment retirements or replacements were indicated in the financial materials submitted by respondents. 76 FCC 2d 465, 484-485. Bacon did not identify equipment replacements as a source of cash flow difficulties in his "Statement." If Pass Word could afford to

expend some $57,000 on additional equipment in 1973 and 1974, but did not construct the two 454 MHz channels for which there was no pressing demand, 76 FCC 2d 465, 499-500, we have to question whether in fact cash flow difficulties were a significant factor in Pass Word's failure to construct the two 454 MHz channels.

23. Petitioners argue that the Commission failed to appreciate that Bacon's "perceptions and attitudes . . . in June 1974 . . . basic understandings of agency requirements and the information available to him . . . are clearly material to mitigation . . . ." To the contrary, we considered at great length these claims and found them unpersuasive, unconvincing, and impossible as the reasons for either the late construction or misrepresentations made. 76 FCC 2d 465, 497-50, 506-514. Petitioners offer no new evidence to contradict those findings.

24. Petitioners contend that we erroneously found that Bacon's February 13, 1973 letter to General Telephone of the Northwest demonstrated a plan to delay construction of the 454 MHz channels through 1976. In support of their contentions, Petitioners state that based upon their past experience, they expected in 1973 that the construction permits might not be granted until two years after the applications were made, and thus the expectation in the 1973 letter that construction would continue through 1976 was reasonable. Assuming a two year lapse before grant was a reasonable expectation, it would not demonstrate a lack of intent to delay construction beyond expiration of the permits. The 1973 letter is only some evidence, not all the evidence. Our finding of an intent to construct late rests not only upon the February 1973 letter, but upon all the circumstances, including the admission that sequential construction was required and the timing of actual construction controlled by financial ability, the

apparent lack of demand for service requiring additional channels, and Bacon's apparent indifference to the necessity of ordering equipment in a timely manner and to known difficulties, and the unpersuasiveness of various reasons offered for the late construction. 76 FCC 2d 465, 487-501.

25. Petitioners contend that the "incorrect information" contained in the 1974 Pass Word and Coeur d'Alene applications to cover license, and service and test notifications, resulted from "inattention to detail" caused by the demands of the computer billing project Bacon executed for Pass Word, and that this "inattention" also explains Bacon's failure to seek advice of counsel regarding the Forms 403 and notifications. First, Petitioners now contradict Bacon's explanation for his failure to seek advice of counsel. 76 FCC 2d 465, 507-508. Second, the claim of "inattention to detail" concerning the misrepresentations in the Forms 403 and the notifications is refuted by the fact that equipment and facilities to construct the 454 MHz channels had not even been ordered, among other things. All the evidence demonstrates deliberate misrepresentation. 76 FCC 2d 465, 506-511. While the affidavit submitted by Pass Word employee Nancy Churchill describes the intensive work Bacon performed on the computer billing project, that affidavit provides no evidence concerning the issue of intent, and does not refute our conclusion that Bacon deliberately misrepresented the state of construction of the 454 MHz facilities in the Forms 403 and notifications.

Petitioners' Proposed Alternative Sanction

26. The alternative sanction proposed by Respondents consists of a suspension of Rodney Bacon from the

management of Pass Word for five years, from employment by Pass Word for two years, and from the voting and financial benefits of stock ownership in Pass Word for five years. It is also proposed that Coeur d'Alene, wholly owned by Rodney Bacon, be sold to Pass Word for its book value of approximately $30,000, and that Mrs. Bacon would be responsible for the management of Pass Word during the five year interim. Mrs. Bacon is a principal of Pass Word by virtue of her stock ownership in Pass Word.

27. In his "Statement" of mitigation, Rodney Bacon stated that two thirds of his parents' income was derived from the royalty rights in Pass Word's revenues, and the remainder came from "modest sources" of stocks, bonds and social security payments. (Statement, p. 71) Whether reconsideration of the sanction would be granted was to be influenced "heavily . . . by . . . the assets, expectations, or sources of income other than the Pass Word royalty" of Mrs. Bacon (CCB 30319, Released April 9, 1980) The royalty is a percentage of Pass Word's gross revenues, with a minimum payment of $10,000, and a maximum of $18,000 per annum.

28. The Trustee for the estate of Jennings Bacon submitted a statement of Mrs. Bacon's net worth and a projected income analysis, prepared by the accounting firm of Coopers & Lybrand. Mrs. Bacon's net worth as of April 1980 was $365,545.00, including the $59,640 par value of her Pass Word stock. Her 1980 after tax income was projected to be $23,356 without the Pass Word royalty or dividends, and $36,019 with the royalty and dividends. It was estimated that one third to one half of her after tax income in the years thereafter would be derived from Pass Word if the licenses were not revoked. Coopers and Lybrand estimate that in the event of revocation, Mrs.

Bacon's disposable after tax income would exceed her cash needs for fourteen years, if in the fourth year after revocation she were to begin selling her corporate bonds at face value and if in the fourteenth year a cash sale of her rental property were arranged. We cannot conclude that revocation would work a significant financial hardship upon Mrs. Bacon of the type alleged.

29. Petitioners' plan would not only result in a temporary suspension of Rodney Bacon from the control of Pass Word and Coeur d'Alene operations, but also provide greater financial benefit to him than if he were permitted to transfer the license or his ownership interest and avoid revocation, a remedy not justified by the circumstances herein. 76 FCC 2d 465, 516, n. 19. Moreover, the proposed sale of Coeur d'Alene to Pass Word can in no way be considered designed to protect Mrs. Bacon's interest in Pass Word, but is advanced for the benefit of Rodney Bacon. Petitioners offer no legal authority for the novel suggestion that a licensee found lacking in character because of repeated deliberate misrepresentation, when no mitigation has been demonstrated, be merely temporarily suspended from control of operations and the financial benefits of ownership. If innocent shareholders cannot be immunized from the consequences of corporate deception, *WMOZ Inc.*, 36 FCC 202 (1964), *FCC v. WOKO, Inc.*, 329 U.S. 223 (1946), then it is impossible to see why the perpetrator of the deception should be immunized. Petitioners' plan is more in the nature of a forfeiture. Where there has been a pattern of deliberate misrepresentation, revocation is the only appropriate remedy. Forfeiture and revocation are not interchangeable remedies. *FCC v. WOKO, Inc.*, 329 U.S. 223 (1946). *WMOZ, Inc.*, 36 FCC 202 (1964); *Sea Island Broadcasting Corp.*, 60 FCC 2d 146 (1976), *aff'd* 627 F.2d 240 (D.C. Cir. 1980). If we were to

adopt Petitioners' proposed plan, the general rule and the policy behind our rule that a licensee found to have engaged in deliberate misrepresentation to this Commission may not transfer his license and reap the financial burden therefrom in order to avoid revocation, would be destroyed. The incentive to desist from willfully false statements and breaches in trust will evaporate if the threat of revocation is removed. Adoption of Petitioners' plan would remove the threat of revocation in the most egregious cases of deliberate misrepresentation. The Commission must depend on the integrity and representations of its licensees, *FCC v. WOKO, Inc.*, 329 U.S. 223 (1946). *Charles P.B. Pinson, Inc. v. FCC*, 321 F.2d 372 (D.C. Cir. 1963).

Conclusion

30. Petitioners contend it is not in the public interest to revoke the licenses of Pass Word and Coeur d'Alene Answering Service because "there is good reason to believe that revocation will precipitate long term and *perhaps* permanent loss of service to many users of Petitioners' stations". (Emphasis added)

31. Petitioners argue that the Commission did not adequately consider the service alternatives available to the public, claiming that the Commission "failed to consider how revocation would actually affect customers who use Petitioners' services." In fact, Bacon did not claim in his "Statement" submitted in mitigation that permanent discontinuance of service to any of his customers would result from revocation, nor did any of the customers who submitted affidavits in support of that "Statement" make any such claims. Rather Bacon argued only that revocation would result in a temporary loss of service to his customers. ("Statement", p. 75)

32. Petitioners claim that the existing alternative services available to the public are not satisfactory, and submit in support an engineering report prepared by Mr. George Schrenk.

33. Petitioners contend that only Coeur d'Alene Answering Service *operates from* location in Coeur d'Alene, and that only one other RCC provides predicted coverage to the community. Petitioners admit that another RCC is capable of providing equivalent coverage to the Coeur d'Alene community. Petitioners do not contend that Coeur d'Alene's low band one-way paging service cannot be duplicated by others, but rather speculate without explanation that this Commission might not grant licenses to others to provide service. Petitioners illogically and impermissibly argue that while the public needs the type of service provided by Coeur d'Alene and that such service could be provided by others, the Commission would not permit that service to be provided.

34. Petitioners contend that a competing Spokane licensee is "probably unable" to absorb Pass Word's VHF paging customers. Petitioners question whether, but do not deny that Mobilfone Northwest would be able to accommodate Pass Word's secondary paging customers. "Probably" does not amount to "unable", and merely raising the question does not prove impossibility.

35. Petitioners assert that Pass Word's VHF mobile coverage is "slightly greater" than that of Mobilfone, and that Mobilfone is unable to accommodate all of Pass Word's mobiles on its current channels. Mobilfone sent a letter to the Mobile Services Division, dated March 24, 1980, to that effect. Pass Word does not contend Mobilfone is incapable of expanding facilities.

36. Finally, Petitioners contend that Courtesy Communications' Spokane UHF system does not offer

coverage equivalent to Petitioners' Pass Word and Coeur d'Alene facilities, and that Mobilfone Northwest would be required to expand its facilities, which already provide equivalent coverage.

37. In summary, Petitioners contend that the Commission did not adequately consider existing service alternatives available to the public, but were unwilling to claim that other carriers do not, cannot, and would not provide equivalent coverage or service. Rather, Petitioners impermissibly speculate that the Commission would not grant licenses to ensure continuing service. The likelihood of any disruption of the service now provided by Pass Word, Inc. and Rodney Bacon d/b/a Coeur d'Alene Answering Service can be kept to a minimum by following procedures similar to those followed in the *Courthouse Broadcasting Co.* case. 21 F.C.C. 2d 792 (1970). "There, we authorized the continued operation of the facility by the former licensee for a period of 180 days or until the initiation of service by a new applicant, whichever occurred first. See also *Radio Broadcasters, Inc.*, 25 FCC 2d 450 (1970). . . We propose to invite applications for a license for this facility and, if deemed advisable, for interim operation pending an award of a license, as soon as this lawfully can be done. Every effort will then be made to provide for service by a qualified applicant as expeditiously as possible." *The Telephone Company, Inc., et al.*, 65 FCC 2d 605, 614 (1977)

38. Petitioners argue that particular items of evidence and/or the entire record do not provide "clear and convincing" evidence of deliberate misrepresentation or deliberate late construction. Petitioners have presented no new evidence which contradicts our findings, arrived at after a tedious and exhaustive examination of extensive evidence and argument offered by respondents, and

evidence produced by investigation. The record admits of no other result.[9]

39. Petitioners' request for oral argument upon reconsideration is denied. No new evidence was offered which could not have been heretofore presented. Nor have Petitioners raised any substantial questions of law or fact which could be resolved more effectively after oral argument.

40. Accordingly, IT IS ORDERED, That the "Joint Petition for Partial Reconsideration" IS DENIED. Respondents are authorized to continue operations for a period of 180 days or until the initiation of service by new applicants(s), whichever occurs first.

FEDERAL COMMUNICATIONS COMMISSION.
William J. Tricarico, *Secretary*.

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[9]Courtesy Communications filed a "Motion to Consider Ex Parte Contacts," and "Comments on Supplement to Request that Ex Parte Communications B [sic] Considered", in which Pass Word is alleged to have solicited forbidden ex parte presentations from members of Congress and the public to the Commission urging adoption of Petitioners' plan. Since reconsideration is denied, and since the licenses of Pass Word, Inc. and Coeur d'Alene are revoked, the question of whether ex parte contacts were solicited is moot.

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No. 81-2405

In the Supreme Court of the United States

OCTOBER TERM, 1982

PASS WORD, INC., ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether, in a license revocation proceeding before the Federal Communications Commission in which the right to a hearing is waived, the licensee must raise any objection to the combination of investigatory and adjudicatory functions prior to the time when the Commission renders its decision on the merits.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is reported at 673 F. 2d 1363. The Commission's order revoking petitioners' licenses (Pet. App. 1b-95b) is reported at 76 F.C.C. 2d 465, and its opinion denying reconsideration (Pet. App. 1c-24c) is reported at 86 F.C.C. 2d 437.

JURISDICTION

The judgment of the court of appeals was entered on April 2, 1982. The petition for a writ of certiorari was filed on July 1, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners Pass Word, Inc. and Rodney J. Bacon (who conducted business under the name Coeur D'Alene Answering Service) held licenses from the Federal Communications Commission which permitted them to provide paging, mobile telephone, and answering services. Petitioner Bacon is the sole owner of Coeur D'Alene, as well as the president, chief operating officer, and owner of 49.5% of the stock of Pass Word (Pet. App. 2a, 2b-3b). On September 28, 1976, the Commission issued an order to show cause why those licenses should not be revoked on the ground that Bacon had made numerous misrepresentations to the Commission in connection with petitioners' applications for additional facilities. See *Pass Word, Inc.*, 61 F.C.C. 2d 410 (1976).

On February 11, 1977, petitioners were granted permission to waive the hearing to which they were entitled under Section 312(c) of the Communications Act of 1934, 47 U.S.C. 312(c), and instead to submit a statement in explanation pursuant to Section 1.92(b) of the Commission's rules, 47 C.F.R. 1.92(b) (see Pet. App. 9b). Section 1.92(d) (47 C.F.R.), provides, in part, that when a hearing is waived, it is the Commission's practice to determine whether revocation is warranted "on the basis of all of the information available to it from any source." When the predecessor of this provision was adopted in 1960, the Commission announced that the waiver of a hearing also would cause the Commission to dispense with observance of the separation of administrative functions that would have been required in the event of a hearing. *Amendment of Part 1 of the Commission's Rules Concerning Revocation and Cease and Desist Proceedings*, 25 Fed. Reg. 12602 (1960).[1]

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[1]The Commission again announced the consequences of a waiver of hearing in a revocation case in *Mullin, Connor & Rhyne*, 41 Rad. Reg.

In accordance with this announced practice, after petitioners' waiver, the Commission's Common Carrier Bureau requested and obtained further information from petitioners (Pet. App. 9b) and then drafted a recommended order of revocation. The Commission discussed that recommendation at an open meeting on December 19, 1979, and finally adopted it on March 4, 1980. The Commission found, as Bacon conceded, that he had made repeated misrepresentations in petitioners' applications. After considering petitioners' mitigation statement, which urged a lesser sanction than revocation, the Commission concluded that petitioners' explanation did not mitigate the "flagrant * * * disregard of licensee responsibility" and that revocation was therefore the "only appropriate remedy" (Pet. App. 91b).

Petitioners sought reconsideration and claimed for the first time that the participation of the Common Carrier Bureau constituted a mixing of prosecutorial and decision-making functions forbidden by the Administrative Procedure Act ("APA"), 5 U.S.C. 554(d). The Commission denied reconsideration (Pet. App. 1c-24c), relying upon its established practice, first announced in 1960 and reiterated in *Mullin, Connor & Rhyne*, 41 Rad. Reg. 2d (P & F) 1681 (Dec. 21, 1977), that when the subject of a revocation proceeding waives a hearing, the Commission may receive information and advice from the Bureau with responsibility over the matter prior to designation for hearing (Pet. App. 9c-10c).

2d (P & F) 1681 (Dec. 21, 1977). After referring specifically to separation of functions, the Commission stated that "[w]aiver of the right to a hearing encompasses waiver of procedural rights associated with hearing cases, except that the Commission's order must contain a statement of its findings and the grounds and reasons therefor" (*id.* at 1682).

The court of appeals affirmed (Pet. App. 1a-4a). It held (*id.* at 4a) that the Commission had not abused its discretion in choosing the sanction of revocation "in view of Bacon's course of conduct [and] his repeated knowing and deliberate misrepresentations to the agency." The court also rejected petitioners' argument concerning the separation of functions (*id.* at 2a-3a), holding that petitioners "knew or should have known" of the Commission's "routine and published" practice in cases such as this and should have interposed a timely challenge instead of raising their objection for the first time in a petition for reconsideration (*id.* at 3a).

ARGUMENT

The decision of the court of appeals is correct. It does not conflict with decisions of this Court or of any other court of appeals. Accordingly, further review by this Court is not warranted.

1. The court of appeals correctly applied the well-established principle, which petitioners overlook, that a claim of disqualification of a government employee or official must be raised as soon as practicable after a party has reasonable cause to believe that grounds for disqualification exist. See, *e.g.*, *Marcus* v. *Director, Officer of Workers' Compensation Programs*, 548 F. 2d 1044, 1051 (D.C. Cir. 1976); *Duffield* v. *Charleston Area Medical Center, Inc.*, 503 F. 2d 512, 515-516 (4th Cir. 1974); *Kramer* v. *United States*, 166 F. 2d 515, 518 (9th Cir. 1948); *Adams* v. *United States*, 302 F. 2d 307, 309 (5th Cir. 1962). This principle applies where the alleged ground for disqualification is the participation by the same government employee in both prosecutorial and decisionmaking functions. *International Paper Co.* v. *FPC*, 438 F. 2d 1349, 1357 (2d Cir.), cert. denied, 404 U.S. 827 (1971). Permitting a party to "suppress his misgivings while waiting anxiously to see whether the decision" is favorable "would only countenance

and encourage unacceptable inefficiency in the administrative process." *Marcus* v. *Director, Office of Workers' Compensation Programs, supra,* 548 F. 2d at 1051.

The record in this case amply supports the court of appeals' conclusion that petitioners knew or should have known far in advance of the Commission's decision that the Commission might receive information and advice from the Common Carrier Bureau. The Commission had publicly announced its policy concerning this matter on at least two occasions. The Commission's most recent announcement in *Mullin, Connor & Rhyne, supra,* had been issued shortly after petitioners' waiver and nearly two years before their case was brought before the Commission. Moreover, in a pleading filed in this very case, the Common Carrier Bureau had stated that it could "investigate and make inquiries after waiver and is obligated to advise the Commission regarding disposition of the revocation issues" (C.A. App. 114).[2] Nevertheless, petitioners did not object to the practice until after the Commission's decision went against them. Faced with this record, the court of appeals correctly concluded (Pet. App. 2a-3a) that petitioners had waived any objection to the Common Carrier Bureau's participation.

2. There also is no merit to petitioners' contention (Pet. 9-13) that the decision in this case conflicts with *Wilson & Co.* v. *United States,* 335 F. 2d 788 (7th Cir. 1964), cert. denied, 380 U.S. 951 (1965), remanded, 382 U.S. 454 (1966), and *Getty Oil Co.* v. *Andrus,* 607 F. 2d 253 (9th Cir. 1979).

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[2]Petitioners disagree (Pet. 12-13) with the assertions of the court below (Pet. App. 3a) that petitioners' objection to the FCC's procedures came only "when alteration of the mode of proceeding in this case was impossible." What petitioners are in effect insisting upon, however, is that the Commission's Office of Opinions and Review must duplicate the task already performed by other staff personnel in appraising the record and preparing a recommended opinion and that thereafter the Commission must again devote its attention to the matter.

In *Wilson & Co.*, parties to an FCC rulemaking proceeding objected for the first time on appeal to the ex parte participation by the Common Carrier Bureau counsel in the Commission's decision. The court of appeals held (335 F. 2d at 794) that the objection had not been waived because the court was "not persuaded * * * that petitioners were on notice during the hearing that such participation might occur and hence should have filed their objections with the Commission." The court did not hold that a party on notice of such possible participation could wait until the Commission had acted before voicing an objection.[3]

There is also no conflict between the decision below and *Getty Oil Co.* In that case, the court of appeals upheld certain awards of geothermal steam leases by the Secretary of the Interior. The court recognized (607 F. 2d at 255-256; emphasis added) that administrative decisions should not be overturned "unless the administrative body not only has erred but had erred *against objection made at the time appropriate under its practice.*" The court then concluded (*id.* at 256), based upon the regulations concerning the relevant procedures and the facts of that particular case, that certain objections to the awarding of the leases had been "sufficiently raised." The court did not hold that a party in an administrative proceeding is entitled to wait until after final agency action before raising new arguments or objections.

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[3]In a footnote in another portion of the opinion, the court observed (335 F. 2d at 797 n.4) that a provision of the Commission's rules stated that "the Common Carrier Bureau 'assists, advises and makes recommendations to the Commission.' " Petitioners interpret (Pet. 10 & n.13) this statement to mean that the objecting parties in *Wilson & Co.* were on notice concerning the Common Carrier Bureau's possible participation. As noted above, however, the court found (335 F. 2d at 794) precisely the opposite.

3. Petitioners' reliance (Pet. 11-12) upon 47 U.S.C. 405 is equally misplaced. That statute provides that a petition for rehearing by the Commission is not a "condition precedent to judicial review" unless "the party seeking such review * * * relies on questions of fact or law upon which the Commission * * * has been afforded no opportunity to pass." That provision obviously does not mean that a party may do nothing until the rehearing stage. It was not intended to forgive all prior procedural defaults.

4. Relying upon *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130 (1967), petitioners maintain (Pet. 13-20) that they did not knowingly and intelligently waive their right to a separation of prosecutorial and adjudicatory functions when they elected to proceed without a hearing. This argument is also without merit.

In *Curtis Publishing Co.* v. *Butts, supra*, a libel action against a publisher, this Court held that the defendant had not waived recently recognized constitutional defenses by failing to raise them before trial. Based upon the uncertain state of the law at the time of trial, the Court concluded (388 U.S. at 143-145) that defendant's lawyer had not acted unreasonably. Here, by contrast, as the court of appeals recognized (Pet. App. 3a), petitioners "knew or should have known * * * that it is the FCC's general practice not to require separation of functions after a waiver of hearing."

5. Finally, petitioners maintain (Pet. 20-22) that a party has a right to separation of functions under the APA, 5 U.S.C. 554(d), even when there is no evidentiary hearing. This argument lacks merit. Section 554(d) applies only to "the decision, recommended decision, or agency review pursuant to [5 U.S.C.] 557," and the latter provision applies only "when a hearing is required to be conducted in accordance with [5 U.S.C.] 556" (5 U.S.C. 557(a). Thus, when a hearing is waived, Section 554(d) is inapplicable.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Federal Communications Commission

AUGUST 1982

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